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No. 10-1011 96

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,

v.

PEGGY L. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether tolling the statute of limitations for individual claimants based on the pendency of a mass personal injury class action violates fundamental federal due process protections where the class action provides no notice to a defendant of the identity of unnamed class members, thus absolutely precluding the timely preservation of evidence and testimony critical to presenting an effective defense?

PARTIES TO THE PROCEEDING

As reflected in the caption, petitioner is Novartis Pharmaceuticals Corporation ("NPC"). Respondent is Peggy L. Stevens.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

NPC certifies that Novartis Finance Corporation, Novartis Corporation, Novartis Holding AG, and Novartis AG are NPC's parent corporations. Novartis AG is the only publicly held corporation that holds ten percent or more of NPC's stock.

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PETITION FOR WRIT OF CERTIORARI

Novartis Pharmaceuticals Corporation ("NPC") respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the Supreme Court of Montana in this case.

OPINION BELOW

The December 30, 2010 opinion of the Montana Supreme Court denying petitioner's appeal of the judgment against it is found at 358 Mont. 474, 247 P.3d 244, and is reprinted in the attached Appendix (Pet. App. 1a-55a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because the decision of the Montana Supreme Court is final and implicates rights afforded by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of the United States Constitution, which reads:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law.

U.S. Const., Amend. XIV, Section 1.

STATEMENT OF THE CASE

A. Statement of Facts

Oncologists prescribe petitioner's drug Zometa® to cancer patients to reduce their risk of painful bone fractures and other bone-related problems that often accompany cancer-weakened skeletal systems. Pet. App. 4a. When respondent's lymphoma spread to her spine, pelvis, and ribs in April 2002, her oncologist Dr. Judy Schmidt prescribed Zometa®. *Id.*

Subsequently, respondent had a cracked tooth extracted with the goal of relieving jaw pain. *Id.* 6a. When respondent continued to have pain at the extraction site notwithstanding an antibiotic regimen, respondent reported the continuing problem to Dr. Schmidt, who ultimately diagnosed respondent with osteonecrosis of the jaw or "ONJ," a condition that by that time had been linked in scientific literature to bisphosphonate drugs such as Zometa®. *Id.* Respondent's oncologist informed her no later than March 18, 2005 that her ONJ was the result of undergoing dental surgery while taking Zometa®. *Id.* 10a. With her cancer in remission, respondent ceased taking Zometa®. *Id.* 6a.

B. Legal Proceedings Related to ONJ

In August 2007, respondent brought an action against her oncologist Dr. Schmidt and her oral surgeon Dr. Morris before the Montana Medical Legal Panel (MMLP), alleging failure to warn of the risk of contracting ONJ as a result of dental surgery while on Zometa®. *Id.* 7a. After the MMLP proceedings concluded in January 2008, respondent filed suit in Missoula County District Court against Dr. Schmidt, Guardian Oncology, and several unnamed fictitious defendants, claiming that all defendants negligently failed to warn her of the known risk of ONJ. *Id.* 8a. Respondent's complaint was timely under Montana's three-year statute of limitations for personal injury actions, which had begun to run in March 2005. *Id.* 10a.

Meanwhile, since the early 2000s petitioner had been facing serial litigation concerning the purported link between Zometa® and ONJ, including several complaints seeking federal class action treatment. *Id.* 7a. One such class action complaint, filed on September 15, 2005 in the federal district court for the Middle District of Tennessee, sought class certification for a purported worldwide class of patients who took Zometa® and later developed ONJ. *Id.*, citing *Becker*, No. 3:05-0719 (M.D. Tenn.). As filed, *Becker* recited claims for medical monitoring, strict product liability, and negligent failure to warn of the danger of Zometa®-induced ONJ. The *Becker* plaintiffs never moved for class certification of their personal injury claims and the case proceeded as a medical monitoring class action. On November 14, 2007, the district court correctly denied class certification of plaintiffs' medical monitoring claims. *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-

1760, 2007 WL 3012972, at *1 (M.D. Tenn. Oct. 10, 2007).

Back in Montana, and nearly four years after respondent was informed of the reported link between Zometa® and ONJ, respondent added petitioner to her pending lawsuit, arguing as a matter of state law that although the claim was otherwise time-barred, she could simply slot in an additional defendant in place of an earlier-named fictitious defendant. Pet. App. 8a. Petitioner immediately raised a statute of limitations defense and moved for dismissal, or in the alternative, for summary judgment. *Id.* The trial court denied petitioner's motion.

Respondent settled her claims against Dr. Schmidt and Guardian Oncology in June 2009. *Id.* Petitioner renewed its motion for summary judgment on its statute of limitations defense and respondent asserted for the first time that the pendency of the *Becker* federal class action in Tennessee federal court tolled the limitations period applicable to her Montana lawsuit. The trial court did not rule on the consequence of the federal class action, but instead determined that respondent could substitute petitioner for the previously-named fictitious defendant. *Id.* The case proceeded to trial on October 13, 2009, and the jury returned a verdict for respondent. *Id.* Petitioner appealed to the Montana Supreme Court.

C. The Montana Supreme Court's Decision Applying *American Pipe* Class Action Tolling

The sole aspect of the Montana Supreme Court's opinion at issue here is its ruling that the pendency of a never-certified federal class action applies to

resurrect respondent's time-barred personal injury claims.

The Montana Supreme Court determined as a matter of first impression in Montana that federal class action tolling should apply to render timely respondent's complaint against petitioner. *Id.* 12a.[1] The Montana Supreme Court noted that the concept of federal class action tolling was first articulated by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, this Court held that "the commencement of the [class action suit] satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." Pet. App. 13a. The Montana Supreme Court observed that concerns of judicial economy drove the result in *American Pipe*, quoting this Court's concern that a contrary holding "would invite 'precisely the multiplicity of activity' that the federal rules of procedure were designed to avoid, as individual plaintiffs would be forced to file preventative motions to join or intervene as parties if the class action status was still pending at the expiration of the statute of limitations." Pet. App. 13a (citing *American Pipe*, at 551). The Montana Supreme Court seized upon this Court's comment (in context of a federal antitrust claim) that federal class action tolling is not inconsistent with proper operation of a statute of limitations given that "limitation periods

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[1] The Montana Supreme Court did not affirm the trial court's conclusion that respondent could circumvent the limitations bar by simply characterizing petitioner as a previously-named "fictitious defendant." Instead the Montana Supreme Court stated that it would uphold the trial court "when it reaches the correct result, regardless of the court's reasoning." *Id.* 12a, 27a.

are designed to ensure justice by preventing surprise, but no surprise exists where defendants are already on notice of the substantive claims being brought against them, as they may be when a class action suit has been filed." Pet. App. 14a.

The Montana Supreme Court noted that this Court broadened the application of the federal class action tolling rule in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), making clear that the statute of limitations is tolled not only as to those class members seeking to intervene in the class action, but also as to individual actions filed by members of the putative class. Pet. App. 15a. The Montana Supreme Court observed that the rule established by *American Pipe* and *Crown, Cork* "is instructive, but gives little guidance as to the outer limits of the doctrine, as has been noted by courts and secondary sources." *Id.* The Montana Supreme Court noted the lack of uniformity in application of the class action tolling rule:

> [T]he rule applies to cases filed in federal court, but states are free to fashion their own class action tolling rules and are not bound by *American Pipe*. Another open question is whether the rule should apply equally to all class actions, or whether distinctions should be recognized, such as between mass tort class actions and securities class actions. Most importantly for the present case, authorities conflict as to whether the rule applies when the individual action is filed in a different jurisdiction than the class action. So called "cross jurisdictional tolling" has rarely been addressed, and the few state courts and secondary sources to have considered the

> doctrine have expressed widely divergent viewpoints.

Pet. App. 15a.

Ultimately, the Montana Supreme Court rejected petitioner's argument that mass torts are generally unsuited for federal class action tolling. *Id.* 18a. The court expressed doubt that the nature of the individual plaintiffs' antitrust claims in *American Pipe* and its progeny were of substantially greater variance than the nature of the plaintiffs' claims in the *Becker* federal class action. *Id.* The court explained that under modern pleading rules, petitioner is entitled to notice of the *nature* of claim, rather than the damages alleged. *Id.* Applying that reasoning, the court concluded that petitioner was effectively put on notice of respondent's claim by the *Becker* federal class action, and allowing class action tolling in this context would not unfairly prejudice petitioner for lack of notice. *Id.* The court did not address directly, but necessarily rejected, petitioner's argument that the application of class action tolling here would violate due process.

REASONS FOR GRANTING THE PETITION

The application of *American Pipe* federal class action tolling to personal injury class actions infringes on a defendant's ability to defend itself in violation of due process principles. Suspending statutes of limitation indefinitely for all purported members of "worldwide" classes of personal injury plaintiffs, based on nothing more than the fiat of filing a Rule 23 federal class action, introduces systemic unfairness to defendants that this Court is uniquely situated to remedy.

This pharmaceutical personal injury case is an especially wrong vehicle for federal class action tolling. *No* pharmaceutical personal injury class action has been certified over opposition and survived appeal in the federal system since the Supreme Court's decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *See, e.g., Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 933-38 (Cal. 1988) (en banc) (rejecting tolling due to pending personal injury class action because such torts are not susceptible to class action certification). Tolling individual actions based on a pending personal injury class action renders limitations periods impermissibly uncertain and invites unnecessary litigation by giving plaintiffs' counsel everywhere an incentive to add putative class relief to every federal complaint just to toll statutes of limitations to the benefit of unknown future plaintiffs.[2]

The same characteristics that make a pharmaceutical class action impossible to certify in federal court – the lack of crucial common characteristics among the class members, such as dates of use, what warnings were or were not transmitted to prescribing physicians, alternative causation issues, and the like – mean that the defendant is *not* adequately placed on notice of the identity of the plaintiffs or the nature of the specific claims they may face by the existence of a putative class action (especially, but not exclu-

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[2] *See* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 573 n. 275 (1996) ("The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.").

sively, in a foreign jurisdiction such as this one). *See Jolly*, 751 P.2d at 936. The putative class action on which respondent relied below is illustrative. The plaintiffs did not even attempt to certify the putative personal injury class from the original complaint: their eventual motion to certify was for a putative class of no-injury plaintiffs seeking only future dental monitoring, and was limited to plaintiffs from certain named jurisdictions not including Montana. *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760, 2007 WL 3012972, at *1 (M.D. Tenn. Oct. 10, 2007).

The justification for the *American Pipe* doctrine, despite its apparent conflict with the purpose of statutes of limitations, is absent where the filing of a class action does not provide adequate notice to defendants. Federal due process must impose some limitation on the application of class action tolling in state court actions. *In re Rezulin Prods. Liab. Litig.*, MDL 1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005) (noting that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable"). For these reasons and the reasons below, this Court should grant the writ of certiorari.

I. Applying *American Pipe* Class Action Tolling To A Personal Injury Class Action As The Court Did Below Precludes Defendants From Preserving Evidence Necessary To Mount A Full Defense To The Claims Against Them In Violation of Basic Due Process Guarantees

This Court has never held that the filing of a personal injury class action under Rule 23 of the Federal Rules of Civil Procedure should toll the

statute of limitations for each member of a purported worldwide class of claimants. Even so, courts (like the Montana Supreme Court below) have reasoned that the logical extension of this Court's rationale in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), requires that exact result.

Courts have applied the so-called *American Pipe* tolling doctrine far beyond the relatively narrow confines of that decision. *American Pipe* held that because the filing of the federal antitrust class action in that case put defendants on notice of the substantive claims being brought against them, it was not inconsistent with the functional purposes of a federal statute of limitations to toll the statute for individual actions involving the same substantive claims. The stated rationale for the class action tolling rule is that if the statute of limitations were not tolled, the federal court system would be burdened both by the class action litigation and by numerous protective filings from the members of the class seeking to preserve their rights to bring suit individually should class certification be denied.

Unlike the personal injury class action on which respondent relied here to revive her time-barred claims, in *American Pipe* this Court recognized "the probability of common issues of law and fact respecting the underlying conspiracy." *Id.* at 553. The Court was also careful to point out that, in applying the tolling rule, "[t]he policies of ensuring essential fairness to defendants" are satisfied when, as in that case, a named plaintiff representative of the class commences a suit and thereby "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may

participate in the judgment." *Id.* at 554-55. As Justice Blackmun wrote in a concurring opinion in *American Pipe*, only individuals whose claims "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," should benefit from class action tolling, so that "the defendant will not be prejudiced" by later actions should certification be denied. *Id.* at 562 (J. Blackmun, concurring).

In *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), this Court emphasized that the *American Pipe* class action tolling rule "creates no potential for unfair surprise" precisely because once a class action complaint is filed, "[t]he defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class." *Id.* at 353. Justice Powell, joined by Justices Rehnquist and O'Connor in a concurring opinion, cautioned that:

> [W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," so that "the defendant will not be prejudiced." Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.

Id. at 355 (J. Powell, concurring).

Mindful of these concerns, some courts have recognized that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable." *In re Rezulin Prods. Liab. Litig.*, MDL

1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005). As the California Supreme Court explained, "[t]he same reasons that render certification of mass-tort claims generally inappropriate render inappropriate the application and extension of *American Pipe*." *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 1123 (Cal. 1988). In other words, a mass tort class action complaint does not provide notice to a defendant as contemplated in *American Pipe* because the complaint does not permit the defendant to identify non-named putative class members, and knowledge of the identity of the putative class members is necessary for the defendant to gather and preserve the evidence necessary to defend against their claims.

The Montana Supreme Court viewed personal injury class actions as substantively identical to the antitrust class action that was the subject of this Court's analysis in *American Pipe*. That comparison ignores distinctions of constitutional dimension because unlike an antitrust class action:

> [t]he individual nature of the personal injuries that lie at the core of most mass tort actions prevents the class action defendant from gathering the evidence necessary to test and challenge absent plaintiffs' claims. Indeed, the defendants generally do not even know the identity of the absent class members and, therefore, are unable to discover evidence about that claimant, or marshal appropriate medical, economic, and other witnesses to comment on that claimant's circumstances.

Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 537 (1996).

As explained in more detail *infra* Section II, many courts have concluded that class action tolling should not be applied in the mass tort context unless the defendant had actual notice of the identities of unnamed class members.[3] The logic of this conclusion flows from the recognition that "[s]tatutes of limitation play a particularly important role in mass torts, in which the central evidence of an action often consists of facts peculiar to the individual plaintiff: prior medical and employment history, unique product exposure, and individualized health and economic prognosis." *Id.* Tolling the limitations period for all purported members of the class during the pendency of class certification proceedings – which in a mass class action can easily take many years – creates an unacceptable risk that by the time the claims of unnamed individuals are adjudicated, evidence critical to defending claims of that individual plaintiff will have been lost.

Indeed, pharmaceutical products liability actions represent the most extreme instance of this problem, due to issues relating to learned intermediaries, concurrent risk factors, specific (as opposed to general) causation, proximate causation regarding warnings, and assumption of risk. A company's defense to the claims of each plaintiff in a purported

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[3] Notice could occur by virtue of the claimant's status as a named plaintiff in a class action proceeding, or through other means. For example, in *Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340 (Md. 2006), the court held that defendants received adequate notice of the individual plaintiff's claims because that particular plaintiff had "actively participated" in the original class action complaint, "by providing an affidavit and giving deposition testimony in which he stated that he had a history of smoking and had been diagnosed with lung cancer." *Id.* at 363.

personal injury pharmaceutical class action will depend not just on those factors that are common to every plaintiff in the purported class – such as general causation – but on myriad issues that will vary from individual plaintiff to individual plaintiff: the prescribing physician (with his or her individual prescribing habits and knowledge), the prescribing physician's contacts with the defendant company, the plaintiff's knowledge of and contacts with the company, the plaintiff's state of health and individual risk factors for the injury at issue, and so on. Because a pharmaceutical personal injury class action does not give defendants notice of the identities of all potential plaintiffs (much less the identities of the prescribing physicians), the filing of a class action does not give the defendant a means to identify and to preserve the evidence that will be critical to the defense of any individual claim. Application of the class action tolling rule in such circumstances impedes a company's very ability to defend itself – an erosion of core due process rights.

II. Federal And State Court Decisions Diverge Sharply On The Appropriate Application Of *American Pipe* Class Action Tolling

While state courts are not bound by *American Pipe*, state courts facing claims regarding class action tolling look to *American Pipe* and its progeny for guidance. As recognized by the court below (Pet. App. 15a-16a), courts have reached different conclusions as to the appropriate application of *American Pipe* based on different class action scenarios. Courts considering the appropriate contours of class action tolling have also necessarily differed as to the degree to which the courts were prepared to sacrifice a

defendant's entitlement to repose from liability. The varied splits in judicial authority – on a number of important and recurring issues as explained below – show that courts and litigants need this Court's guidance on the appropriate application of the class action tolling doctrine consistent with constitutional guarantees.

A. Split As To Type(s) Of Class Actions To Which *American Pipe* Class Action Tolling Should Apply

State courts and other authorities are split as to whether class action tolling should apply equally to all class actions, or whether distinctions should be recognized, such as between mass tort class actions and securities class actions.

Unlike the Montana Supreme Court in this case, some state courts hold that mass tort cases are unsuited for class action tolling because defendants are not fairly put on notice of the identity of the plaintiffs or the nature of the specific claims against them where the class claims are not substantially similar, such as relating to issues of proximate and alternative causation. This is in contrast with other class action suits, such as litigation involving securities offerings, where the facts constituting the individual claims are all but identical. In *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App. 1995), for example, a Texas court concluded that the distinction between personal injury class actions and other class actions "is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit," especially given "the variety of claims necessarily

involved in [personal injury cases]." *Bell*, 899 S.W. at 758.

Similarly, in *Jolly v. Eli Lilly & Co.*, 751 P.2d 923 (Cal. 1988), the California Supreme Court held that "[t]he same reasons that render certification of mass-tort claims generally inappropriate render inappropriate the application and extension of *American Pipe*" to mass tort cases. *Jolly*, 751 P.2d at 936-37. The court noted that the elements of personal injury claims "vary widely from claim to claim," and that personal injury class action suits might be "presumptively incapable of apprising defendants of the substantive claims being brought against them" as a result. The court concluded that the class action suit did not "sufficiently put defendants on notice of the substance and nature of plaintiff's claims," and that such notice was "a prerequisite, in our view, to the application of *American Pipe*." *Id.*

Indeed, prior to the Montana Supreme Court's decision that is the subject of this petition, only one other state supreme court – New Jersey – had permitted tolling related to a personal injury class action. Significantly, to ensure basic fairness to defendants, the New Jersey Supreme Court mandated that to obtain the benefit of class action tolling, either a plaintiff's identity must be ascertainable to the defendant upon the filing of the class action (*e.g.*, a named plaintiff), *or* that the plaintiff must show that she deferred filing an individual suit in reliance on the pendency of the class action. *See Staub v. Eastman Kodak*, 726 A.2d 955, 967 (N.J. 1999) (discussing application of class action tolling in products liability action involving myelogram contrast dye).

B. Split As To Availability Of "Cross-Jurisdictional" *American Pipe* Class Action Tolling

As recognized by the court below (Pet. App. 15a), courts also do not agree on whether tolling should apply when the individual action is filed in a different jurisdiction than the class action (so-called "cross-jurisdictional tolling"). The Montana Supreme Court was not troubled by the "cross-jurisdictional" nature of the tolling (actually, "double cross-jurisdictional" tolling because here the court permitted tolling for a state-filed individual action based on an out-of-state federal class action).

In contrast to the court below, other state courts have declined to adopt cross-jurisdictional tolling because tolling across jurisdictions presents concerns with respect to sovereignty and federalism. As the Tennessee Supreme Court reasoned, adoption of cross-jurisdictional tolling would "make the commencement of [one state's] statute of limitations contingent on the outcome of class certification as to any litigant who is part of a putative class action filed in any federal court in the United States," and as a result "would essentially grant to federal courts the power to decide when [the state's] statute of limitations begins to run." *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000). The Tennessee Supreme Court likewise held that adoption of the doctrine "would run the risk that Tennessee courts would become a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought . . . [w]e cannot sanction such forum shopping." *See also Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998) (while class action tolling in the same court system

furthered judicial economy, tolling across jurisdictional boundaries "may actually increase the burden" on the court system of the state adopting cross-jurisdictional tolling, "because plaintiffs from across the country may elect to file . . . in that state solely to take advantage of the generous tolling rule.").

Still other state courts, like the Montana Supreme Court here, have applied cross-jurisdictional tolling notwithstanding these concerns. *See, e.g.*, *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002) ("Whether a class action is filed in Ohio or in the federal court system, the defendant is put on notice of the substance and nature of the claims against it."); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 n. 4 (N.J. 1999) (finding "no reason for tolling to depend on whether the class action is pending in state or federal court," because the application of cross-jurisdictional tolling "would tend to promote the efficiency of both state and federal court systems because suits asserting the individual claims of the class members might be filed in either court system or in both."); *Hyatt Corp v. Occidental Fire & Casualty Co.*, 801 S.W.2d 382 (Mo. Ct. App. 1990) (applying cross-jurisdictional tolling without recognizing a distinction between intra-jurisdictional and cross-jurisdictional tolling); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986) (same).

C. Split As To Whether *American Pipe* Class Action Tolling Should Apply To Never-Certified Class Action Claims

Respondent – a personal injury plaintiff from Montana who did not seek medical monitoring – was

not even a purported member of the medical monitoring class for which certification was sought (and ultimately correctly denied) in *Becker*. Even so, the Montana Supreme Court tolled the limitations period applicable to her personal injury claims based on the pendency of the *Becker* federal class action. The Montana Supreme Court reasoned that *Becker* placed petitioner sufficiently on notice of respondent's claim because petitioner's alleged failure to warn resulting in ONJ injury served as the "underpinning for both the [*Becker*] class action suit and [respondent's] claim" (Pet. App. 17a-18a) irrespective of the claim as to which certification is actually sought. The Montana Supreme Court's holding in this regard conflicts with decisions of other courts considering similar issues. *See Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003) (for tolling purposes, the relevant class is that for which certification is ultimately sought); *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 253-54 (10th Cir. 1994) (same); *see also Ammons v. La-Z-Boy Inc.*, No. 1:04-CV-67-TC-SA, 2009 WL 3460306, at *5 (D. Utah Oct. 20, 2009) (same).[4]

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[4] Characterizing the *Becker* plaintiffs' pursuit of medical monitoring as an issue of damages, the Montana Supreme Court further reasoned that petitioner "is only entitled to be noticed of the nature of claim, rather than the damages alleged, which need not be pleaded specifically." (Pet. App. 18a.) The court then theorized that petitioner was aware of the "nature" of respondent's claims by virtue of the *Becker* complaint. While true at some high level of abstraction, this rationale ignores the reality that knowledge of the likelihood of similar future claims from unknown individuals does nothing to allow a defendant to preserve case-specific evidence now that will be critical to a future defense.

D. Split Within The Zometa® Litigation Itself As To The Application Of *American Pipe* Class Action Tolling

Judge Todd Campbell – the federal judge overseeing the Aredia®/Zometa® multidistrict litigation – rejected a request for class action tolling in a claim nearly identical to the one considered by the Montana Supreme Court here. *See In re Aredia & Zometa Prods. Liab. Litig. (Foster)*, No. 3:08-0932, 2010 WL 4977066 (M.D. Tenn. Dec. 7, 2010). Much like respondent here, the plaintiff in *Foster* claimed tolling of the applicable statute of limitations by virtue of a putative federal class action lawsuit by a different plaintiff involving Zometa®. Rejecting the claim that a class action filed in federal court tolled a state statute of limitations, Judge Campbell relied on the Tennessee Supreme Court's statement in *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 809 (Tenn. 2000), that allowing tolling in this circumstance "would essentially grant to federal courts the power to decide when Tennessee's statute of limitations begins to run." Both *Foster* and the instant case involved the same personal injury claim – namely a plaintiff who alleges development of ONJ attendant to use of Zometa® – but whose claim petitioner maintained was time-barred.

Although petitioner submitted the *Foster* decision to the Montana Supreme Court as supplemental authority, the Montana Supreme Court decided this issue in the exact opposite way from Judge Campbell, thus deepening the existing split discussed above among various courts' treatment of the cross-jurisdictional tolling issue.

Foster is significant because it was decided by Judge Campbell who oversees pretrial proceedings

and motions in hundreds of consolidated cases involving claims related to Zometa®, including the purported federal medical monitoring class action *Becker*, on which respondent persuaded the court below to toll the statute of limitations applicable to her Montana lawsuit. *See In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760, 2007 WL 3012972 (M.D. Tenn. Oct. 10, 2007) (denying certification of putative federal medical monitoring class actions in *Becker*, *Anderson*, and *Wood*).[5]

III. The Proper Application Of *American Pipe* Class Action Tolling To Personal Injury Class Actions Presents Important And Recurring Issues

The central premise of the Fourteenth Amendment is that no person may be "deprived of life, liberty or property without due process of law." U.S. Const., Amend. XIV. To require a litigant to defend a personal injury action beyond the limitation period simply because that defendant has (or has had) class action claims involving the same product and injury pending against it departs from long-settled, traditional methods of civil adjudication. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994)

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[5] Judge Campbell denied certification in three separate class actions involving petitioner's cancer drugs. (Pet. App. 7a.) *Foster* references (*see Foster* at 3 n. 2) yet another never-certified purported class action involving Aredia® and/or Zometa® – *Thorn v. Novartis Pharmaceuticals Corp.*, Case. No. 3-04-cv-0586 – not relied upon by respondent here, yet nevertheless suggesting just how complex and elongated the statute of limitations calculation becomes if any class action complaint, irrespective of merit or actual reliance by the plaintiff, can be seized upon by a purported class member to revive a time-barred claim.

(departures from traditional methods of adjudication presumptively violate due process). This Court has made clear that the guarantee of "due process of law" ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of rights." *Pennoyer* v. *Neff*, 95 U.S. 714, 715 (1877); *see also Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1855).

Although statutes of limitations in tort actions are typically the province of the states, it is not the case that this Court is without power to impose a course correction on widespread misapplication of this Court's reasoning in *American Pipe*. The Due Process Clause indisputably constrains the conduct of litigation in state courts. *See, e.g., Brinkerhoff-Favis Trust & Say. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative, branch of government."). It is likewise settled that due process protections extend to the litigation of civil lawsuits. *See, e.g., Pennoyer* 95 U.S. 714, 733 (1877) ("[T]here can be no doubt" that "due process of law," "when applied to judicial proceedings," "mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."). Finally, due process guarantees certainly apply to the conduct and ramifications of class actions. The notion that state court procedures must conform to constitutional commands is well recognized in the class action context. *See, e.g., Ortiz* 527 U.S. 815, 847-48 & n.24 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940). If, as

here, a state court relies on a never-certified federal personal injury class action to toll the statute of limitations for an individual claimant in a manner that extinguishes or significantly curtails a defendant's ability to defend against liability on the individual claim, this Court has jurisdiction to correct the resulting deprivation of due process.

The issues raised by this petition are important and recurring. The prevalence of class action lawsuits is bound to continue – particularly if rulings like those at issue here are allowed to stand. *See* Lee & Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 1 (2008) (noting 72% increase in class action activity between 2001 and 2007). Lawyers have exploited the *American Pipe* doctrine by filing class actions with little chance of certification with the goal of extending limitations periods. As some commentators have observed, however, the resulting problem for both sides is "that the often-successful attempt to expand limitation periods delays resolution of mass torts, to the detriment of plaintiffs who did file their suits in a timely manner and defendants who seek to put a mass tort behind them." J. Beisner & J. Miller, *Litigate the Torts and Not the Mass* (WLF Monograph) (2009).

This case presents an ideal vehicle for the Court to provide needed guidance on the extent to which due process limits the proper application of class action tolling. While a class action can be an appropriate procedural device for streamlining certain types of litigation, this Court has repeatedly cautioned that class actions cannot be employed to override fundamental due process requirements. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845-48 (1999);

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591, 620 (1997); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985).

Imagining the consequences of applying *American Pipe* class action tolling in the context of class action cases currently pending before this Court illustrates the importance of the issue presented, as well as the need for timely resolution. *Dukes v. Wal-Mart*, 603 F.3d 571, 577-78 (9th Cir.), *cert. granted*, 131 S. Ct. 795 (2010) was filed more than ten years ago as a putative nationwide employment class action on behalf of 1.5 million current and former female employees of Wal-Mart. Under an expansive application of *American Pipe*, roughly 1.5 million separate individual claims of civil rights violations have been tolled for nearly ten years (far exceeding their applicable statutes of limitation) while various courts have debated whether class certification is even proper, and with no substantive trial on the merits in sight. *See also Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1 (2010) (granting motion to stay a $270,000,000 judgment involving a statewide class action filed in 1996 on behalf of a purported 210,000 unidentified smokers in Louisiana against various cigarette manufacturers noting that it is "significantly possible that the judgment below will be reversed").

The extent to which due process principles inform the limits of class action tolling remains unclear. As the court below noted, the class action tolling "rule established by [*American Pipe* and *Crown, Cork & Seal*] is instructive, but gives little guidance as to the outer limits of the doctrine, as has been noted by courts and secondary sources." Pet. App. 15a; *see also In re Vioxx Products Liab. Litig.*, 478 F. Supp. 2d

897, 911 (E.D. La. 2007) ("Merck argues that *American Pipe* tolling should not even apply in this case, because it is unreasonable for plaintiffs to rely on the potential certification of a class of persons allegedly injured by a pharmaceutical drug, since such classes are rarely certified. . . . However, until such a uniform rule prohibiting certification of personal injury class actions is announced, the Court will faithfully apply *American Pipe*.").

The contours of the *American Pipe* doctrine remain uncertain; litigants and the court system would benefit from this Court's clarification of the proper application of its precedent to the multiple questions on which courts have disagreed.[6]

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[6] Courts have split as to the proper application of the *American Pipe* class action doctrine in other contexts not directly implicated here. For example, courts disagree as to whether the class action tolling rule can apply to the filing of a subsequent class action. *Compare Yang v. Odom*, 392 F.3d 97, 103 (3rd Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005), (*American Pipe* tolling rule applicable when a member of a putative class action brings a similar successor class action upon denial of class certification in the first case); *Catholic Social Services, Inc. v. Immigration Naturalization Service*, 232 F.3d 1139, 1149 (9th Cir. 1987) (en banc) (same), *with Madani v. Shell Oil Co.*, 357 Fed. Appx. 158 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3477 (2010) (refusing to extend *American Pipe* tolling rule to save untimely filing of successor putative class action where previously asserted similar claims by the same putative class had been dismissed); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir.), *cert. denied*, 525 U.S. 870 (1998) (same, noting that "[p]laintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely"). Courts are also deeply divided on whether a plaintiff can invoke class action tolling to revive time-barred claims when the plaintiff does not wait out the results of the class action to file her individual claim. *Compare In re Hanson Nuclear Reservation Lit.*, 534 F.3d 986

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 30, 2011

(9th Cir.) (recognizing the circuit split and applying *American Pipe* tolling rule to save untimely individual claim while class certification motion was still pending), *cert. denied*, *sub. nom.*, *E.I. DuPont de Nemours & Co. v. Stanton*, 129 S. Ct. 762 (2008); *with Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005) (tolling not available for individual actions brought before a certification decision has been made because the "purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification").

APPENDIX

APPENDIX

DA 10-0029

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2010 MT 282

PEGGY L. STEVENS,
Plaintiff, Cross-Appellant and Appellee,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula,
Cause No. DV 08-100
Honorable John W. Larson,
Presiding Judge

COUNSEL OF RECORD:

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Argued and Submitted: September 23, 2010
Decided: December 30, 2010

Filed: _____
Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 A Missoula County jury returned a verdict awarding Peggy Stevens (Stevens) $3,200,000.00 in compensatory damages in Stevens' action for negligence against Novartis Pharmaceuticals Corporation (Novartis). Stevens alleged that Novartis failed to properly warn that its drug, Zometa, causes osteonecrosis of the jaw (ONJ) in patients who undergo dental surgery while taking the drug. The District Court denied Novartis' motions for summary judgment, ruled against Novartis on several evidentiary issues, and denied post-trial motions for judgment as a matter of law and for a new trial. Novartis appeals these rulings. Stevens cross-appeals, claiming that the trial court erred in denying Stevens permission to file an amended complaint, in dismissing a Novartis sales representative from the action, and in offsetting

social security disability benefits against the jury award.

¶2 We affirm in part and reverse in part.

¶3 We consider the following issues on appeal:

¶4 *1. Whether the District Court erred in denying Novartis' motion for summary judgment.*

¶5 *2. Whether the District Court erroneously instructed the jury as to Novartis' duty to warn.*

¶6 *3. Whether the District Court erred in refusing Novartis permission to amend its complaint to include an apportionment defense.*

¶7 *4. Whether the District Court erred in excluding statements in prior pleadings that were allegedly inconsistent with Novartis' liability.*

¶8 *5. Whether the District Court erred in admitting testimony regarding a change to Novartis' warning label.*

¶9 *6. Whether Novartis is entitled to judgment as a matter of law because Stevens failed to prove proximate causation.*

¶10 *7. Whether the District Court erred in refusing Stevens permission to amend her complaint to include a claim for punitive damages.*

¶11 *8. Whether the District Court erred in offsetting social security disability benefits against the general damages awarded by jury.*

¶12 *9. Whether the District Court erred in dismissing Stevens' negligence claims against Patrick Doyle, a sales representative for Novartis.*

FACTUAL AND PROCEDURAL BACKGROUND

¶13 Peggy Stevens was diagnosed with follicular lymphoma in October 2000 by Dr. Judy Schmidt (Dr. Schmidt), a Missoula oncologist. At the time, Stevens served as the house supervisor at Community Medical Center, where she had been employed for nearly 20 years. In April 2002, Dr. Schmidt prescribed Novartis' drug Zometa to Stevens after finding lymphoma in Stevens' spine, pelvis and ribs. Zometa, like other drugs in the "bisphosphonate" family, is administered intravenously to cancer patients who are at risk of bone fractures and other bone-related problems due to cancer-weakened skeletal systems. Zometa works by attacking cells called "osteoclasts" that normally dissolve old bone, which has the result of hardening bones to make them more resilient. At the time Dr. Schmidt prescribed Zometa to Stevens in April 2002, the drug had only recently been approved by the Federal Drug Administration (FDA), and no serious reports of any negative side effects had arisen.

¶14 Experts soon began to take note, however, of the large number of ONJ patients who were also taking bisphosphonates. Several months after Stevens began taking Zometa, Dr. Robert Marx, a leading national expert, published an award-winning medical textbook which first mentioned the possible link between ONJ and bisphosphonates. Novartis responded in September 2003 by changing the Zometa label to include a mention of ONJ, stating that "cases of [ONJ], primarily of the jaws, have been reported since market introduction." The label also stated, however, that ONJ has "other well-documented risk factors," and "it is not possible to determine if [cases of ONJ] are related to Zometa."

The label pointed to chemotherapy and smoking as the more likely and more well-established causes of ONJ.

¶15 Dr. Marx continued to sound the alarm, writing of a "growing epidemic" of ONJ in bisphosphonate patients. In December 2003, Novartis convened an advisory panel on the subject in coordination with the American Society of Clinical Oncology. The panel included Dr. Marx and another expert, Dr. Salvatore Ruggiero, who had echoed Dr. Marx's reports of ONJ-bisphosphonate linkage. In March 2004, a second panel was convened at Novartis headquarters, again with Dr. Marx, Dr. Ruggiero, and other leading national figures present. A main goal of this second panel was to draft a "white paper" on the topic, which was eventually published in June 2004. The white paper was met with heavy criticism from Dr. Marx and others. They asserted that the paper failed to admit the clear causal relationship between bisphosphonates and ONJ, and that it misleadingly identified other factors such as chemotherapy and smoking as the more likely causes of ONJ in bisphosphonate patients. In the same month the paper was released, Novartis again changed its Zometa label, adding that the majority of reported cases of ONJ were "in cancer patients attendant to a dental procedure" and advising that "although causality cannot be determined, it is prudent to avoid dental surgery as recovery may be prolonged."

¶16 Stevens continued visiting Guardian Oncology for treatment, although her relationship with Dr. Schmidt no longer included active consultation. Instead, Stevens interacted with the nursing staff and visiting physicians at the clinic. She began having pain in her jaw in August 2004, and was

subsequently advised that her tooth was cracked and she would need to have surgery to remedy the problem. Stevens called Guardian Oncology on August 31, 2004, in connection with the upcoming dental procedure. She advised clinic staff and locum tenens physicians that she needed to have dental work done and was planning on having her tooth extracted (a much less expensive procedure than alternative possibilities such as root canal therapy and crown lengthening) in the near future. No concerns regarding ONJ were raised, and Stevens made an appointment with Dr. Eugene Morris, an oral surgeon, for the procedure. Dr. Morris was unaware that Stevens was taking Zometa, but testified that even if he had known, it would not have made a difference as he was unaware of the relationship between Zometa and ONJ until 2006. Dr. Morris performed the extraction on September 27, 2004.

¶17 Within days, Stevens began having additional pain at the extraction site. She went on an antibiotic regimen, but the pain failed to abate. Stevens reported the continuing problem to Dr. Schmidt, who ordered an MRI in early 2005. The MRI suggested that Stevens had contracted ONJ, which was confirmed by further testing. Stevens stopped taking Zometa around this time, although the drug was still present in her body as it has a half-life of over a decade. While Stevens' ONJ continued to develop into a serious problem, her cancer was in remission, as it has been ever since. In October 2006, exposed bone first became visible at the extraction site. In April 2007, Stevens took what was intended to be a temporary break from work, but could not return to work without pain medication. Because Community Hospital requires its employees to abstain from all narcotics while on duty, however, Stevens was forced

to abandon her position. She has been out of work ever since. ONJ has no cure and is progressive, and thus Stevens' condition will only deteriorate as more of her jawbone dies. Like all ONJ patients, Stevens suffers from chronic pain and constant infection, and manages her condition with antiseptic mouthwash, antibiotics, and powerful narcotics for pain.

¶18 The growing recognition of a link between ONJ and bisphosphonates caused reverberations in the courtroom as well as the medical community. On September 15, 2005, three class action suits were filed against Novartis in federal court in Tennessee. In one of these suits, *Susan Becker, et al. v. Novartis Pharms. Corp.*, No. 3:05-0719 (M.D. Tenn.), counsel for the named plaintiffs sought to represent a world-wide class of plaintiffs who contracted ONJ after using Zometa. The suit alleged failure to warn, among other claims, and sought damages for personal injuries. Class certification was eventually denied and claims were ordered severed on November 14, 2007. During the pendency of the suit, the linkage between bisphosphonates, dental surgery, and ONJ had become widely accepted. Novartis had long since sent a "Dear Doctor" letter to doctors regarding Zometa and other bisphosphonates, admitting that the ONJ-bisphosphonate link was no longer an unproven hypothesis, but rather an established medical conclusion.

¶19 In August 2007, Stevens brought an action against Dr. Schmidt and Dr. Morris before the Montana Medical Legal Panel (MMLP), alleging failure to warn of the risk of contracting ONJ as a result of dental surgery while on Zometa. Dr. Schmidt responded that she did not have knowledge of these risks, and Dr. Morris responded that there were no

other feasible options available to Stevens. In January 2008, after the conclusion of the MMLP proceedings, Stevens filed suit in Missoula County District Court against Dr. Schmidt, Guardian Oncology, and several fictitious defendants, claiming that they knew of the risk of ONJ but negligently failed to warn her. Stevens substituted Novartis and its sales representative, Patrick Doyle, for the fictitious defendants named in the complaint in January 2009. Novartis immediately raised a statute of limitations defense and moved for summary judgment. The District Court denied Novartis' motion on the basis that the complaint was timely filed as to the fictitious defendants, and that Novartis had failed to show that it was not properly substituted. Novartis had failed to show that the substitution was improper, explained the court, because "the nature of Novartis' alleged culpability may have been unknown at the time of Plaintiff's original complaint." A protective and confidentiality order was entered in May 2009, and the case proceeded to discovery. Stevens settled her claims against Dr. Schmidt and Guardian Oncology in June 2009, and they were dismissed from the case in July. Numerous motions were filed refining the scope of issues at trial. The parties were both denied leave to amend the pleadings, and additional cross-motions seeking to postpone the trial date were denied as well. Novartis again moved for summary judgment on its statute of limitations defense, but was again denied. The case proceeded to trial on October 13, 2009, before the Hon. John Larson.

¶20 Eight days later, a Missoula County jury returned a verdict of $3,200,000.00 in Stevens' favor. A hearing on potential offsets was held in January 2010, after which the District Court entered an order reducing the award to $2,657,257.32. The offsets

included the amount Stevens received in settlement with Dr. Schmidt and Guardian Oncology, the amount she received in short-term disability for six months in 2007, and the social security disability benefits she had received and would receive in the future. Stevens was awarded her costs. Novartis filed post-trial motions for a new trial and for judgment as a matter of law, which were denied. Novartis timely appealed.

¶21 We held oral argument on September 23, 2010, directing the parties' attention to two issues: Stevens' alleged statute of limitations violation and Novartis' duty to warn.

STANDARD OF REVIEW

¶22 We review a district court's grant or denial of a motion for summary judgment de novo. *State v. Butte-Silver Bow Co.*, 2009 MT 414, ¶ 17, 353 Mont. 497, 220 P.3d 1115; *Goettel v. Est. of Ballard*, 2010 MT 140, ¶ 10, 356 Mont. 527, 234 P.3d 99. Applying the criteria contained in M. R. Civ. P. 56, we determine whether the moving party has established both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Goettel*, ¶ 10 (citing *Watson v. Dundas*, 2006 MT 104, ¶ 16, 332 Mont. 164, 136 P.3d 973).

¶23 We review jury instructions for abuse of discretion to determine whether the jury instructions, as a whole, fully and fairly instructed the jury on the applicable law. *State v. Johnston*, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70. We review evidentiary rulings for an abuse of discretion, and a district court possesses broad discretion to determine the admissibility of evidence. *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514 (citing

Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶ 74, 338 Mont. 259, 165 P.3d 1079).

¶24 We review a district court's findings of fact to determine whether they are clearly erroneous. *Emmerson v. Walker*, 2010 MT 167, ¶ 20, 357 Mont. 166, 236 P.3d 598. We review questions of law de novo. *In re Fair Hrg. of Hanna*, 2010 MT 38, ¶ 13, 355 Mont. 236, 227 P.3d 596. We review a district court's interpretation of a statute for correctness. *Signal Perfection, Ltd. v. Rocky Mt. Bank -Billings*, 2009 MT 365, ¶ 10, 353 Mont. 237, 224 P.3d 604.

DISCUSSION

¶25 *1. Whether the District Court erred in denying Novartis' motion for summary judgment.*

¶26 Novartis has strenuously argued over the life of this litigation that Stevens' claims are time-barred. Montana's three-year statute of limitations for personal injury actions, § 27-2-204, MCA, ostensibly began to run on March 18, 2005, when Stevens was first informed she had ONJ as a result of undergoing dental surgery while taking Zometa. Stevens filed a timely complaint in January 2008 against Dr. Schmidt, Guardian Oncology, and John Does one through four. She amended the complaint to substitute Novartis for one of the fictitious defendants in January 2009, three years and 10 months after the statute of limitations began to run. Stevens maintains that Novartis was timely served because parties who are fictitiously named pursuant to § 25-5-103, MCA, are considered part of the action from its inception. M. R. Civ. P. 4(E)(2). Novartis counters that the fictitious name statute applies only when the plaintiff is unaware of the defendant's identity. Given that Stevens was fully aware of Novartis' name and that

Zometa had caused or contributed to her ONJ, Novartis contends, she cannot escape her failure to timely name Novartis as a defendant.

¶27 In the alternative, Stevens argues that the statute of limitations was tolled by the *Becker* class action suit. In this suit, plaintiffs' counsel sought class certification for a worldwide class of patients who took Zometa and later contracted ONJ. *Becker*, No. 3:05-0719 (M.D. Tenn.). The suit contained claims for strict product liability and negligence for failure to warn doctors and consumers of the danger of Zometa-induced ONJ. Plaintiffs sought medical monitoring, compensatory damages, and punitive damages. The suit was pending from September 15, 2005, until November 14, 2007, when the district court denied class certification and ordered that the claims be severed and individual amended complaints filed. Stevens asserts that because the *Becker* class action contained a request for worldwide class certification, and contained a claim for failure to warn against the dangers of Zometa-induced ONJ, the statute of limitations was tolled as to Stevens, along with all other potential class members, under the "class action tolling" rule. Because the statute of limitations was tolled for over two years during the pendency of the *Becker* class action, argues Stevens, the amended complaint was timely filed as to Novartis regardless of whether it relates back to the original complaint via the fictitious name statute. Novartis replies that the class action tolling rule ought not apply to the current situation for a variety of reasons, most notably that the class action suit in question was filed in a different jurisdiction than the present suit.

¶28 In reviewing the District Court's conclusions on whether Stevens' claims are barred by the statute of limitations, we are mindful that we will uphold a district court when it reaches the correct result, regardless of the court's reasoning. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 37, 344 Mont. 540, 189 P.3d 615. Thus, we will uphold the District Court here if we find that Novartis was properly substituted as a fictitious defendant or that the limitations period was tolled during the pendency of the Becker class action suit.

¶29 After careful consideration of the principles at issue, we are persuaded that the class action tolling rule logically applies here. We thus conclude that Stevens' amended complaint was timely filed. We will therefore not reach the issue of whether Novartis was properly substituted for a fictitious defendant.

¶30 Class action tolling is a matter of first impression in Montana. The doctrine was first established by the United States Supreme Court in the landmark case *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756 (1974). In *American Pipe*, several companies were accused of antitrust violations for the alleged price-fixing of steel and concrete pipe projects, and faced both criminal and civil complaints filed by the federal government. After the conclusion of the criminal case and the filing of a consent judgment in the civil case, the State of Utah filed suit, professing to represent a class consisting of various state and local governmental bodies damaged by the companies' price-fixing scheme. Utah's suit was filed in federal district court within eleven days of the expiration of the applicable statute of limitations. Seven months later, the court denied class certification, concluding that the class was not so numerous

as to be impracticable—thus failing the numerosity requirement for class certification under Fed. R. Civ. P. 23(a). When more than 60 governmental bodies that had been claimed as members of the original class filed motions to intervene as plaintiffs eight days after class action status was denied, the court denied their motion on the basis that the statute of limitations had run.

¶31 The Ninth Circuit reversed. It concluded that "as to the members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing," reasoning that "[t]he claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits." *Utah v. American Pipe & Constr. Co.*, 473 F.2d 580, 584 (9th Cir. 1973). The United States Supreme Court granted certiorari to "consider a seemingly important question affecting the administration of justice in the federal courts." *American Pipe*, 414 U.S. at 545, 94 S. Ct. at 762.

¶32 The Supreme Court affirmed the Ninth Circuit, holding that "the commencement of the [class action suit] satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs." The Court pinned its reasoning on the furtherance of judicial economy. "To hold to the contrary," the Court opined, would invite "precisely the multiplicity of activity" that the federal rules of procedure were designed to avoid, as individual plaintiffs would be forced to file preventative motions to join or intervene as parties if the class action status was still pending at the expiration of the statute of limitations. *Id.* at 551, 94 S. Ct. at 765. Furthermore,

continued the Court, "no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)," and who thus "cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." *Id.* The Court reasoned that "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it," and thus, it would be illogical to require active participation before such point for other purposes such as class action tolling. *Id.* at 552, 94 S. Ct. at 765.

¶33 The Court also noted that class action tolling "is in no way inconsistent with the functional operation of a statute of limitations." The Court explained that limitation periods are designed to ensure justice by preventing surprise, but no surprise exists where defendants are already on notice of the substantive claims being brought against them, as they may be when a class action suit has been filed. *Id.* at 554-55, 94 S. Ct. at 766-67. "Within the period set by the statute of limitations," the Court concluded, "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action [or not]." *Id.* at 555, 94 S. Ct. at 767.

¶34 Recognizing that it was stepping into unknown territory, the Court limited its holding to instances in which the plaintiffs seek to *intervene* in a class action where class certification has been denied. The Court

broadened this narrow holding, however, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392 (1983), making clear that the statute of limitations is tolled not only as to those class members seeking to intervene in the class action, but also as to individual actions filed by members of the putative class.[1] The rule established by these two decisions is instructive, but gives little guidance as to the outer limits of the doctrine, as has been noted by courts and secondary sources.

¶35 For example, the rule applies to cases filed in federal court, but states are free to fashion their own class action tolling rules and are not bound by *American Pipe*. Another open question is whether the rule should apply equally to all class actions, or whether distinctions should be recognized, such as between mass tort class actions and securities class actions. Most importantly for the present case, authorities conflict as to whether the rule applies when the individual action is filed in a different jurisdiction than the class action. So called "cross jurisdictional tolling" has rarely been addressed, and the few state courts and secondary sources to have considered the doctrine have expressed widely divergent viewpoints.

¶36 Novartis urges this Court not to adopt class action tolling in Montana in the present case for two principal reasons. First, Novartis argues that the

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[1] *Crown, Cork & Seal* also dispensed with *American Pipe's* limitation to instances in which class certification was denied for failure to satisfy the numerosity requirement of Fed. R. Civ. P. 23(a). The class in *Crown* was denied certification for several additional reasons. Other courts applying class action tolling in the years since then have followed *Crown's* lead, and the specific basis for denial of class certification has rarely been considered a significant factor.

doctrine is premised on the provision of fair notice to defendants through the claims made in the class action, and that no such notice was provided in the present case. It contends that the type of class action suit at issue today—a mass tort—is generally unsuited for class action tolling. Second, Novartis argues that the more well-reasoned and widely adopted view of the doctrine rejects cross jurisdictional tolling, and therefore, as the class action suit was filed in Tennessee, it should not toll Montana's statute of limitations. We address these arguments in turn.

¶37 We first consider the contention that the doctrine should not apply because Novartis was not afforded proper notice of Stevens' claims. Novartis advances both generic and specific arguments on this point. In general, Novartis argues that mass torts are unsuited for class action tolling, because a central principle of the tolling doctrine—notice to defendants—is not present. Specifically, Novartis argues that it did not receive effective notice of Stevens' claim through the *Becker* class action suit. Novartis contends that the policy of affording notice to defendants through statutes of limitation is not satisfied where neither the individual plaintiffs' injuries nor the facts necessary to the claims are substantially similar. Advocates of this view draw a contrast with other class action suits, such as for securities offerings, where the facts constituting the individual claims are all but identical. Several courts have found this distinction persuasive. In *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App. 1995), a Texas court declined to extend its existing class action tolling rule to a personal injury class action suit, concluding that the distinction between personal injury class actions and other class actions "is impor-

tant in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit," especially given "the variety of claims necessarily involved in [personal injury cases]." *Bell*, 899 S.W.2d at 758.

¶38 Similarly, in *Jolly v. Eli Lilly & Co.*, 751 P.2d 923 (Cal. 1988), the California Supreme Court reversed a lower court's application of the class action tolling rule in a suit for personal injuries caused by a defective pregnancy drug. While the decision turned on the fact that the individual suit sought damages for personal injury while the class action suit did not, the court offered a variety of reasons why it considered *American Pipe* inapposite. The court noted that the elements of personal injury claims "vary widely from claim to claim," and that personal injury class action suits might be "presumptively incapable of apprising defendants of the substantive claims being brought against them" as a result. *Id.* at 937 (citation and internal quotation marks omitted). The court concluded that the class action suit did not "sufficiently put defendants on notice of the substance and nature of plaintiff's claims," and that such notice was "a prerequisite, in our view, to the application of *American Pipe*." *Id.* at 936-37.

¶39 Novartis contends that the present facts parallel those in *Jolly*, and do not support the rationale behind *American Pipe* because the class action suit failed to put Novartis on sufficient notice of Stevens' claims. While we may later encounter a situation in which a class action suit does not afford sufficient notice to the defendants of subsequent plaintiffs' claims, we do not believe we are faced with such an instance today. Novartis' alleged failure to warn, and the injury caused as a result, serve as the

underpinning for both the class action suit and Stevens' claim, and the warnings issued by Novartis to healthcare professionals around the country were presumably the same or substantially similar.

¶40 More importantly, it is not necessary that the claims be identical. *Tosti v. L.A.*, 754 F.2d 1485, 1489 (9th Cir. 1985) ("[w]e find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled."). We are not convinced that the nature of the individual plaintiffs' claims in *American Pipe* and its progeny were of substantially greater variance than the nature of the plaintiffs' claims in the *Becker* class action. Under modern pleading rules, Novartis is only entitled to be noticed of the *nature* of claim, rather than the damages alleged, which need not be pleaded specifically. The argument that mass torts are unsuited for class action tolling seems to afford too little weight to the critical distinction between variance in damages and variance in the nature of claims. We are unpersuaded that mass torts are unsuitable for class action tolling.[2] We conclude that Novartis was effectively put on notice of Stevens' claim by the *Becker* suit, and allowing class action tolling in this context would not unfairly prejudice Novartis for lack of notice.

¶41 We next consider Novartis' argument that class action tolling should not be applied here because the class action suit and Stevens' suit were filed in different jurisdictions. Novartis correctly

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[2] There have been class certifications in mass tort suits. *See e.g. In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987). Likewise, courts have extended class action tolling in mass tort cases. *See e.g. Staub v. Eastman Kodak Co.*, discussed *infra* n. 5.

observes that state courts have rarely adopted cross-jurisdictional tolling, and that the doctrine has been rejected by courts in several states. The large majority of courts to consider the issue, however, have stopped short of outright adoption or rejection. While Novartis claims that the doctrine has been "widely rejected," in reality the doctrine has seldom been squarely addressed, and it is clear that its outlines are still in the process of developing. Many of the cases Novartis cites as "rejecting" the doctrine, for example, are merely circuit court decisions looking to existing state law, finding no authority one way or the other, and declining to decide the issue without guidance from the state's high court. In *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008), for example, the Ninth Circuit declined to import the doctrine to California law, observing that "[t]he California Supreme Court has not adopted such cross-jurisdictional tolling," and deferring to "California's interest in managing its own judicial system."

¶42 Two recent decisions rejecting the doctrine shed light on the rationale behind limitation of the class action tolling rule to actions filed in the same jurisdiction. In *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102 (Ill. 1998), the Illinois Supreme Court affirmed the dismissal of state court claims brought by plaintiffs, who sought to rely on a federal class action suit to toll the statute of limitations. The court reasoned that while class action tolling in the *same* court system furthered judicial economy and was sound policy, tolling across jurisdictional boundaries "may actually increase the burden" on the court system of the state adopting cross-jurisdictional tolling, "because plaintiffs from across the country may elect to file . . . in that state solely to take advan-

tage of the generous tolling rule." *Id.* at 1104. The Illinois court thus rejected the doctrine, claiming that "[b]y rejecting cross-jurisdictional tolling, we ensure that the protective filings predicted by plaintiffs will be dispersed throughout the country rather than concentrated in Illinois." *Id.* at 1105.

¶43 In *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000), the Tennessee Supreme Court rejected cross-jurisdictional tolling for essentially the same reason. "Adoption of the doctrine," opined the court, "would run the risk that Tennessee courts would become a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought . . . [w]e cannot sanction such forum shopping." *Id.* at 808. Fearing a "mass exodus of rejected putative class members from federal court to Tennessee," the court affirmed a lower court's ruling that the plaintiffs' suit was time-barred. *Id.* at 809. The court also expressed distaste at a perceived lack of state sovereignty, observing that adoption of the doctrine would give federal courts control over the running of Tennessee state statutes of limitation.

¶44 Nearly all other negative treatments of the doctrine have either declined to extend it in the limited circumstances in which it was presented, or have ruled based on existing precedent established in cases such as *Portwood* and *Maestas*.[3] It is clear that

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[3] Many of the cases cited by Novartis, much like *Clemens v. DaimlerChrysler*, are federal court decisions that decline to extend the doctrine before the state's highest court has had the opportunity to consider the issue. *See e.g. In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 811 (E.D. La. 2007) (declining to expand Puerto Rico's class action tolling jurisprudence to include cross-jurisdictional tolling); *In re Urethane Antitrust*

the main reason state courts decline to adopt cross-jurisdictional tolling is the fear that doing so while the doctrine is not yet widely accepted will trigger a rush on the courts of that state. Courts rejecting the

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Litig., 663 F. Supp. 2d 1067, 1082 (D. Kan. 2009) (declining to expand Tennessee's class action tolling jurisprudence to include cross-jurisdictional tolling in antitrust cases); *Thelen v. Mass. Mut. Life Ins. Co.*, 111 F. Supp. 2d 688, 694-95 (D. Md. 2000) (same, for Maryland); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999) (same, for Virginia); *In re Enron Corp. Secs.*, 465 F. Supp. 2d 687, 722 (S.D. Tex. 2006) (same, for Texas); *Love v. Wyeth*, 569 F. Supp. 2d 1228, 1237 (N.D. Ala. 2008) (same, for Alabama).

Other courts have concluded that state legislatures are the proper avenue for adoption of the doctrine, or have otherwise based their decision on a lack of statutory authority. *Senger Bros. Nursery, Inc. v. E.I. Dupont de Nemours & Co.*, 184 F.R.D. 674, 683 (M.D. Fla. 1999); *Thoubboron v. Ford Motor Co.*, 624 A.2d 1210, 1213 (D.C. 1993). The only courts that actually have rejected the doctrine, besides *Portwood* and *Maestas*, are *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 933-38 (Cal. 1988) (rejecting cross-jurisdictional tolling because the class action suit in question did not provide adequate notice to the defendants, as the class action only sought monitoring and the individual action was for personal injury. The court explicitly left the door open for cross-jurisdictional class action tolling in other contexts, but expressed doubt that it would ever find the doctrine applicable to mass-tort class action suits.), and *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 756-58 (Tex. App. 1995) (declining to toll the Texas statute of limitation by a personal injury class action filed in New Mexico, as a matter of policy and because it was not properly preserved for appeal); *Ravitch v. Price-Waterhouse*, 793 A.2d 939, 941-44 (Pa. Super. 2002) (denying cross-jurisdictional tolling after examining the split in authority and finding *Portwood's* "reasoning persuasive."). Other cases rejecting the doctrine have merely applied these cases as precedent. *See e.g. Ottaviano v. Home Depot, Inc.*, USA, 701 F. Supp. 2d 1005, 1012-13 (N.D. Ill. 2010) (applying *Portwood*); *In re Aredia and Zometa Prods. Liab. Litig.*, No. 3-06-MD-1760 (M.D. Tenn.) (applying *Maestas*).

doctrine have paid scant attention to any perceived unfairness to defendants, with rare exceptions. *See e.g. Bell v. Showa Denko K.K.*, 899 S.W.2d at 758. Thus, the reasons for rejection of cross-jurisdictional tolling do not generally include a perceived incompatibility with principles underlying statutes of limitation.

¶45 We conclude that the *Becker* class action fairly put Novartis on notice of the substance of Stevens' claims. This is doubly true because Stevens' complaint was filed ten months after the alleged expiration of the limitations period—in stark contrast to drastic scenarios such as that confronted by the *Portwood* court, where the plaintiffs sought to get around a limitations failure of over a decade through a class action suit that had been pending for a full nine years.[4]

¶46 We are convinced that the decisions adopting cross-jurisdictional tolling more effectively balance the considerations at issue.[5] In *Vaccariello v. Smith*

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[4] The *Portwood* plaintiffs filed suit in 1991 for property damages allegedly occurring between 1976 and 1979, when the plaintiffs' Fords suffered from a defect causing the cars to shift without warning. The plaintiffs claimed that the statute of limitations was tolled by a class action suit filed in 1981 and not dismissed until 1990. *Portwood*, 701 N.E.2d at 1102-03.

[5] *Hyatt Corp v. Occidental Fire & Casualty Co.*, 801 S.W.2d 382, 389 (Mo. App. 1990) (applying cross-jurisdictional tolling in personal injury suit without recognizing a distinction between intra-jurisdictional and cross-jurisdictional tolling); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 961-68 (N.J. Super. App. Div. 1999) (applying cross-jurisdictional tolling in a personal injury suit against a drug manufacturer, wherein the court observed that "[w]e see no reason for tolling to depend on whether the class action is pending in state or federal court," and that application of cross -jurisdictional tolling "would tend

& Nephew Richards, Inc., 763 N.E.2d 160 (Ohio 2002), the Ohio Supreme Court heard the claims of a plaintiff, Vaccariello, injured by a medical device known as a "pedicle screw," implanted in her spine to relieve back pain. The trial court denied the defendant's motion for summary judgment, concluding that the statute of limitations was tolled during the pendency of a nationwide class action against the device manufacturer filed in Pennsylvania federal district court, of which Vaccariello was a potential class member. The intermediate court reversed, and the Ohio Supreme Court allowed a discretionary appeal. Noting that Ohio's own class action rule was virtually identical to the federal rule, the court concluded that "a class action filed in federal court serves the same purpose as a class action filed in Ohio," and "[w]hether a class action is filed in Ohio or in the federal court system, the defendant is put on

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to promote the efficiency of both state and federal court systems because suits asserting the individual claims of the class members might be filed in either court system or in both." *Id.* at 967 n. 4); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 162-63 (Ohio 2002) (discussed above); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. App. 1986) (applying cross-jurisdictional tolling in a state equal protection suit for claims which were certified in federal court, without recognizing a distinction between intra-jurisdictional and cross-jurisdictional tolling). Other decisions have indicated approval of the doctrine. *In re W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52, 66 n. 10 (W. Va. 2003) (deciding the case on other grounds, but stating that the lower court's concern over differing limitations periods applying to the numerous plaintiffs was misplaced because of the probable application of the class action tolling rule, and not recognizing a distinction for cross-jurisdictional tolling); *see also Knouse v. Gen. Am. Life Ins. Co.*, 391 F.3d 907, 914-15 (8th Cir. 2004); *In re Linerboard Antitrust Litig.*, 223 F.R.D. 335 (E.D. Pa. 2004).

notice of the substance and nature of the claims against it." *Id.* at 162-63. "Therefore," concluded the court, "allowing the filing of a class action in the federal court system to toll the statute of limitations in Ohio does not defeat the purpose of the statute." *Id.* at 163.

¶47 The *Vaccariello* court then proceeded to discuss *Portwood*, explaining why it did not find the holding persuasive:

> In *Portwood v. Ford Motor Co.* (1998) (citation omitted), the Supreme Court of Illinois rejected cross jurisdictional tolling "because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule," thereby burdening Illinois' court system. We are not persuaded that this is a realistic potential problem.
>
> Our holding today merely allows a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court in Pennsylvania to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class that is seeking certification in a federal class action to file suit individually in Ohio courts to preserve their Ohio claims should the class certification be denied. The resulting multiplicity of filings would defeat the purpose of class actions.

Id. We agree with these considerations. We do not expand access to Montana's courts beyond the access to which out-of-state plaintiffs are already entitled. Our state's policy is plainly stated in the Montana Constitution: "[c]ourts of justice shall be open to

every person, and speedy remedy afforded for every injury to person, property, or character." Mont. Const. art. II, § 16. The right of access to our court system is "unrestricted by reference to residence or citizenship," and an out-of-state plaintiff has "the same rights and duties as a citizen of this state." *LaBella v. Burlington N.*, 182 Mont. 202, 207, 595 P.2d 1184, 1187 (1979) (internal citations and quotation marks omitted); § 49-1-204, MCA. Any citizen of the United States may file suit in Montana's courts, provided that jurisdiction may properly be asserted over the defendant. Thus, our decision today does not expand the class of potential plaintiffs in Montana.

¶48 We concede, however, that in adopting cross jurisdictional tolling we may well create the incentive complained of in *Portwood* and *Maestas*, for out-of-state plaintiffs to file suit in Montana courts when their claims are time-barred in other jurisdictions. We do not dismiss this concern lightly. While the *Vaccariello* court opined that "[o]ur holding does not invite plaintiffs who have no relationship to Ohio to file suit in our courts," we acknowledge that our holding today may indeed encourage plaintiffs with "no relationship to Montana" to file suit in our courts, if their claims are stale elsewhere. *Vaccariello*, 763 N.E.2d at 163. But as we have observed above, *all* plaintiffs, regardless of residency, are constitutionally guaranteed the right to file suit in Montana. We conclude that the best judge of these competing arguments will be experience. As we have noted when faced with similar situations, "if a substantial increase in this type of litigation is called to our attention in the future we will reexamine the situation in light of what we have herein stated." *Labella*, 182 Mont. at 207, 595 P.2d at 1187 (quoting *State ex rel. Great N. Ry. v. Dist. Ct.*, 139 Mont. 453, 457, 365

P.2d 512, 514 (1961), and concluding that Montana's open court policy, as set out in Mont. Const. art II, § 16, guarantees out-of-state plaintiffs the right to file in Montana state courts.).

¶49 Thus, although avoiding the possibility of a rush of out-of-state plaintiffs filing in our court system is concededly a valid policy objective, we consider this objective less compelling than competing considerations. We suspect that a greater burden on the court system will be imposed by *not* adopting the rule, as plaintiffs would be required to file protective individual suits in Montana courts to avoid limitations defenses, while otherwise relying on a pending class action suit filed elsewhere. This directly conflicts with the rationale underlying the class action tolling rule: to promote judicial economy by encouraging individual plaintiffs to defer to class action suits to protect their claims. We see no reason why jurisdictional boundaries should operate as a bar to the application of this policy. Where, as here, the defendants are already on fair notice of the claims against them through a timely class action suit, the policies underlying the limitations period are not subverted.

¶50 We recognize that in some instances a class action suit may *not* fairly put the defendants on notice. Our adoption of the rule is therefore limited to situations in which defendants are fairly put on notice of the substantive claims against them. Were we confronted with a case such as that faced by the California Supreme Court in *Jolly*, where the individual claim sought damages for personal injuries but the class action suit sought only monitoring, we would likely not see fit to extend the doctrine. *Jolly*, 751 P.2d at 936. Similarly, the present case involved

an alleged limitations failure of under a year. Were we to confront a situation such as the one faced by the *Portwood* court—where the class action suit was alleged to have tolled the statute of limitations for *over a decade*—we might find the principles of notice and fairness to defendants not met and the doctrine inapplicable. Thus, before tolling the statute of limitations during the pendency of a class action suit, we must examine the circumstances present in the case to ensure that defendants are not unfairly prejudiced, regardless of the jurisdictions in which the actions are filed. On the facts before us today, we conclude that tolling our state statute of limitations best upholds the competing policies at issue.

¶51 Because we determine that the statute of limitations was tolled during the pendency of the *Becker* suit, we conclude that Stevens' complaint was timely filed. We thus do not reach the question of whether Novartis was properly named as a fictitious defendant under § 25-5-103, MCA.

¶52 *2. Whether the District Court erroneously instructed the jury as to Novartis' duty to warn.*

¶53 Novartis contends that it is entitled to a new trial because the District Court incorrectly instructed the jury that it had a duty to warn health care professionals other than Stevens' prescribing physician. Under the "learned intermediary" doctrine adopted by Montana in *Hill v. Squibb & Sons, E. R.*, 181 Mont. 199, 206, 592 P.2d 1383, 1387-88 (1979), Novartis argues, its duty to warn extends *only* to the prescribing physician—in this case, Dr. Schmidt. Stevens counters that Novartis misrepresents the holding in *Hill*, and that the District Court correctly stated the duty to warn as set out in the Restatement (Third) of Torts (hereafter, "the Restatement"), which

provides that warnings must be provided to "prescribing and other healthcare providers who are in a position to reduce risks of harm." *Restatement (Third) of Torts: Products Liability* § 6(d)(1) (1998). Novartis asserts that the Restatement's version of the doctrine is in conflict with the majority view, which has been adopted by Montana. Novartis supports this contention by noting that Montana has not adopted this latest version of the Restatement. Stevens responds that the distinction made by Novartis between Montana law and the Restatement is a false one, and that the particular facts surrounding Stevens' care support the Restatement's expression of the doctrine.

¶54 The learned intermediary doctrine has been widely accepted, in some form, for the better part of the past century. Although Novartis asserts that we adopted a controlling interpretation of the doctrine in *Hill*, that case was decided on entirely different grounds and contained no discussion, or even specific mention, of the learned intermediary doctrine. We thus agree with Stevens that Novartis ascribes improper weight to dicta in *Hill*, and conclude that the greater body of common law offers a fuller, more perspicacious perspective on the doctrine.

¶55 Despite its wide acceptance, the doctrine has constantly been under attack, and has evolved through the years to confront the changing nature of the healthcare system. Part of this evolution has been a movement away from limiting the doctrine's applicability to the prescribing physician alone. The version of the doctrine set out in the Restatement, which includes "other healthcare providers" in the possible class of learned intermediaries, reflects this modern trend. In traditional doctor-patient relation-

ships, the doctor provides the patient with the resources to make an informed choice, through explanation of the risks and benefits involved with a certain drug and knowledge of the patient's medical history. In these conventional, individualized doctor-patient relationships, the doctor is in the best position to understand and communicate warnings effectively to the patient—the "learned intermediary" standing in between the patient and the pharmaceutical company. The modern healthcare system, however, places far less emphasis on these traditional relationships, and patients today often receive the majority of their care from nurses, nurse practitioners, physicians' assistants, and physicians other than the prescribing physician. Appropriately, in situations where the underlying rationale of the doctrine—the traditional doctor-patient relationship—is no longer present, the doctrine has adapted to fit the realities of the situation.

¶56 This evolution has occurred on two principal fronts. The first of these, which has received the lion's share of the attention but is not at issue today, is when the duty to warn is extended not only to other healthcare providers, but to *patients*—thus, not applying the doctrine at all.[6] The second, which is

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[6] Three exceptions to the doctrine, imposing a duty to warn the consumer, have arisen in the courts. First, public health clinics and mass immunization programs have commonly been found to lack the requisite doctor-patient relationship. *See e.g. Davis v. Wyeth Laboratories*, 399 F.2d 121, 131 (9th Cir. 1968) (manufacturer of polio vaccine was not protected by the learned intermediary doctrine because the vaccine was dispensed at a mass immunization clinic, outside the context of the doctor-patient relationship); *accord Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1276-77 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096, 95 S. Ct. 687 (1974). Second, when the patient is actively involved

directly relevant to our discussion, is the evolution of the doctrine through an expansion of the possible class of learned intermediaries. This development, likewise spurred by the fact that the medical professionals with whom patients most commonly interact are often no longer primary physicians, has led courts and secondary sources such as the Restatement to suggest that a variety of different healthcare providers may be considered learned intermediaries, depending on the unique facts of the patients' treatment scenario.[7]

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in choosing to use a given drug, some courts have not applied the doctrine. This exception has usually arisen in relation to birth control pills. *See e.g. MacDonald v. Ortho Pharm. Corp.*, 475 N.E.2d. 65, 68-70 (Mass. 1985); *Hill v. Searle Laboratories*, 884 F.2d 1064, 1070-71 (8th Cir. 1989). Third, some courts have declined to apply the doctrine where there has been excessive direct-to-consumer advertising of the drug. *See e.g. State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 901 (W. Va. 2007).

Secondary sources have vigorously argued for both preservation of the doctrine, and for its elimination in some (or all) circumstances. For a defense of the traditional form of the doctrine, *see* Jennifer Girod, Note, *The Learned Intermediary Doctrine: An Efficient Protection for Patients, Past and Present*, 40 Ind. L. Rev. 397, 398 (2007) (arguing that while doctor-patient relationships have changed since the doctrine was first adopted, the doctrine is as relevant as ever because the disparity between physician and patient knowledge still exists). For arguments against the doctrine's continued relevancy, *see* Susan A. Casey, *Comment, Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine*, 19 Wm. Mitchell L. Rev. 931, 934-37 (1993); Teresa Moran Schwartz, *Consumer-Directed Prescription Drug Advertising and the Learned Intermediary Rule*, 46 Food Drug Cosmetic L. J. 829, 829-31 (1991).

[7] *See Holley* and *McEwen*, discussed *infra* ¶¶ 57-58; *Whitley v. Cubberly*, 210 S.E.2d 289, 292 (N.C. 1974) (requiring warnings

to all members of the "medical profession" using the drug); *Singleton v. Airco*, 314 S.E.2d 680 (Ga. 1984) (considering the adequacy of warnings directed at trained nurse anesthesiologists); *Mazur v. Merck & Co.*, 964 F.2d 1348, 1356 (3d Cir. 1992) (declining to extend the doctrine to a school nurse, but indicating that the doctrine would extend to nonprescribing physicians, physicians' assistants, and nurses acting in an area of special expertise); *Walker v. Merck & Co.*, 648 F. Supp. 931, 934-35 (M.D. Ga. 1986), *aff'd*, 831 F.2d 1069 (11th Cir. 1987) (finding that Georgia law considered nurse practitioners to be learned intermediaries); *Rohrbough v. Wyeth Labs.*, 719 F. Supp. 470, 478 (N.D. W. Va. 1989) (designating registered nurses who administered vaccines as learned intermediaries); *Wyeth-Ayerst Lab Co. v. Medrano*, 28 S.W.3d 87, 92-94 (Tex. Ct. App. 2000) (concluding that the doctrine applies to advanced practice nurses who prescribe medication and treat patients without the supervision of a physician); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 142 (3d Cir. 1973) (extending the duty to warn to treating as well as prescribing physicians).

For secondary sources arguing for or observing the doctrine's evolution to fit modern healthcare, *see* Robert J. Friedman, *Take Two of These and Sue Me in the Morning: Efficacy of the Learned Intermediary Doctrine in Prescription Drug Failure to Warn Cases*, 22 St. Thomas L. Rev. 278 (2010); Ozlem A. Bordes, *The Learned Intermediary Doctrine and Direct-to-Consumer Advertising: Should the Pharmaceutical Manufacturer Be Shielded from Liability?*, 81 U. Det. Mercy L. Rev. 267, 267-68 (2004); Timothy S. Hall, *Reimagining the Learned Intermediary Rule for the New Pharmaceutical Marketplace*, 35 Seton Hall L. Rev. 193, 198 (2004); Sheryl Calabro, Note, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where It Belongs*, 25 Cardozo L. Rev. 2241, 2254-56 (2004); Daniel Richardson, Note, *The Lost Child of Products Liability: New Thoughts about Advertising and the Learned Intermediary Doctrine*, 27 Vt. L. Rev. 1017, 1018 (2003); Paul F. Strain & Christina Gaarder, *Direct-to-Consumer Advertising and the Learned Intermediary Doctrine: Unsettling a Settled Question*, 30 U. Balt. L. Rev. 377, 382-83 (2001); Mitchell S. Berger, *A Tale of Six Implants: The* Perez v. Wyeth Laboratories *Norplant Case and the Applicability of the Learned Intermediary Doctrine to Direct-to-Consumer Drug Promotion*, 55 Food & Drug L.J.

¶57 For example, in *Holley v. Burroughs Wellcome Co.*, 330 S.E.2d 228, 235-36 (N.C. App. 1985), the court considered a registered nurse anesthesiologist who was responsible for the patient's anesthesia to be a learned intermediary to whom the manufacturer owed a duty to warn. The CRNA failed to recognize a known adverse reaction, which caused permanent brain damage in the patient. Just as Novartis argues today, the manufacturer asserted that its duty to warn was satisfied because the learned intermediary doctrine limited the scope of its duty to warn to the prescribing physician. The court was not persuaded. Noting that it was "standard practice" for CRNAs to be responsible for monitoring, maintenance, and supervisory care of anesthetized patients, the court dismissed the argument that the duty to warn only extended to the prescribing physician as "unpersuasive in the present context," and "not appropriate in actions like the present one." *Id.* at 235. The court reasoned that while the "[d]efendants' argument would be appropriate in cases . . . where a nurse only administered a medicine . . . but was otherwise not

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525, 551 (2000); Timothy A. Pratt & John F. Kuckelman, *The Learned Intermediary Doctrine & Direct-To-Consumer Advertising of Prescription Drugs*, 51 Fed'n. Ins. & Corp. Counsel Q. 17 (2000), *available at* http://www.thefederation.org/documents/pratt.htm (April 5, 2004); Catherine A. Paytash, Note, *The Learned Intermediary Doctrine and Patient Package Inserts: A Balanced Approach to Preventing Drug-Related Injury*, 51 Stan. L. Rev. 1343, 1349 n. 24 (1999); Edward W. Gerecke & Harvey L. Kaplan, *The Restatement (Third) of Torts and its Projected Impact Upon Manufacturers of Prescription Drugs and Medical Devices, Drug and Medical Device Litigation: Defense Perspectives*, 2 Def. Research Inst. 70, 71 (1998); 63A Am. Jur. 2d Products Liability §§ 1206-07 (1997); Jerry J. Phillips, *Products Liability in a Nutshell* 225-29 (4th ed., West 1993) (hornbook discussion of the doctrine).

responsible for the patient's care," the nurse anesthesiologist in *Holley* was responsible for all aspects of patient treatment. Thus, the court concluded, the duty to warn ought to apply to her as the primary healthcare provider standing in between the patient and the manufacturer. *Id.*

¶58 Similarly, in *McEwen v. Ortho Pharm. Corp.*, 528 P.2d 522, 528-30 (Or. 1974), the court reviewed the underlying premise of the doctrine and extended the duty to warn beyond the prescribing physician. The plaintiff had been prescribed a contraceptive, but received treatment for a negative reaction to the drug from other physicians. The court explained that "[a]lthough the ethical drug manufacturer's duty to warn has been discussed most often with reference to the prescribing physician, the [doctrine's] reasoning applies with equal force to the treating physician . . . [who] may be more likely to observe the actual symptoms of the drug's untoward consequences." The court concluded that the manufacturer's duty to warn "extends, then, to all members of the medical profession who come into contact with the patient in a decision-making capacity." *Id.* at 529.

¶59 The realities of modern medicine increasingly conflict with the learned intermediary doctrine's underlying premises. Unsurprisingly, the doctrine is in a state of flux as it adapts to new medical practices. We need not set out the precise confines of the doctrine as it would apply to numerous hypothetical scenarios. We concur with authorities who consider the learned intermediary to be the healthcare professional actually responsible for making decisions related to the patient's care, especially when the prescribing physician is no longer involved with the continuing treatment and supervision of the patient.

In these instances, the underlying rationale of the individualized relationship between the prescribing physician and the patient is truly no longer present. Here, it is clear that Stevens received much of her treatment from nurses, treating physicians, and nurse practitioners, and that Dr. Schmidt was rarely, if ever, a participant in her continuing care. Most importantly, when Stevens called Dr. Schmidt's practice to discuss the risk of dental surgery while on Zometa, she spoke with a locum tenens physician rather than Dr. Schmidt herself.

¶60 These facts suggest that the scope of Novartis' duty to warn, in this case, would presumably include at least the treating locum tenens physicians at Guardian Oncology who counseled Stevens on dental surgery, if not the nurses who routinely administered Zometa to Stevens.[8] We do not find the Restatement, nor the District Court's instructions, at odds with the body of law in this area, or with any precedent set out by this Court in *Hill*. We need not conclusively decide this issue today, however, because Novartis cannot demonstrate that the instruction resulted in prejudicial error.

¶61 Novartis cannot demonstrate prejudicial error because the jury verdict form allowed the jury to find Novartis negligent *without* relying on the allegedly deficient jury instruction. The jury verdict form asked whether Novartis was negligent "in its label or

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[8] The trial court also seemed to include Dr. Morris, the oral surgeon, within the scope of the duty to warn. Novartis asserts that this was erroneous; however any such error could not have affected the verdict, as the jury verdict form asked only whether Novartis was negligent in its warnings to Dr. Schmidt and Guardian Oncology staff—thus excluding Dr. Morris from consideration.

information to Dr. Judy Schmidt and Guardian Oncology treating professional staff." (Emphasis added.) Accordingly, the jury had two options: (A) the label was inadequate, or (B) the information provided to Dr. Schmidt and the treating staff was inadequate. The error complained of—an overbroad scope of the duty to warn—is *only* implicated with regard to (B), the "information," and not with regard to (A), the label.[9] Accordingly, Novartis cannot demonstrate that the duty to warn was even considered by the jury in reaching its verdict, and therefore cannot demonstrate prejudicial error as a result of the instruction.

¶62 Thus, while we would tend to conclude that the jury instruction correctly instructed the jury on the applicable law, we need not definitively resolve this issue today. It is clear that because the instruction was not implicated by one of the two mutually exclusive alternatives, Novartis cannot demonstrate that the instruction resulted in prejudicial error. We affirm the District Court.

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[9] The "information" provided by Novartis appears from the record to consist of two items: 1) the label, that is, the package insert in every Zometa package, and 2) a letter that Novartis sent to Dr. Schmidt, in response to an inquiry Dr. Schmidt made regarding two Zometa patients who had developed ONJ. As Dr. Schmidt was apparently the only recipient of this letter, the "information" received by Dr. Schmidt and other clinic staff was arguably different, which implicates the scope of Novartis' duty to warn. The label, in contrast, was obviously the same for all and was received by everyone at the clinic, and thus does *not* implicate the scope of the duty to warn.

¶63 *3. Whether the District Court erred in refusing Novartis permission to amend its complaint to include an apportionment defense.*

¶64 We review the denial of a motion to amend, like other discretionary rulings made by a district court, for an abuse of discretion. *Deschamps v. Treas. St. Trailer Ct., Ltd.*, 2010 MT 74, ¶ 18, 356 Mont. 1, 230 P.3d 800. The trial court's decision will not be reversed in the absence of an affirmative showing of abuse of that discretion resulting in prejudice. *Id.* (citing *Callan v. Hample*, 73 Mont. 321, 326, 236 P. 550, 551-52 (1925)). Amendments are permitted by M. R. Civ. P. 15(a), which provides that a party may amend the party's pleading by leave of the court. The proposed amendment should be permitted, in keeping with the policy that leave to amend "shall be freely given when justice so requires," unless: (1) the "motion causes undue delay, is made in bad faith, is based upon a dilatory motive on the part of the movant, or is futile," or (2) "the party opposing the amendment would incur substantial prejudice as a result of the amendment." *Stundal v. Stundal*, 2000 MT 21, ¶ 12, 298 Mont. 141, 995 P.2d 420.

¶65 The District Court denied Novartis permission to amend its complaint to assert a defense seeking to apportion liability between Novartis and Dr. Schmidt for the damages suffered by Stevens. The court's stated basis was that Novartis had not acted with reasonable promptness, given that almost two months had passed since the notice of settlement between Dr. Schmidt and Stevens. The court reasoned that to allow amendment to include a completely new defense with less than a month before trial would substantially prejudice Stevens, who had repeatedly sought to discover whether Novartis planned on

asserting that any third parties shared responsibility for Stevens' injuries.

¶66 We conclude that it was within the District Court's discretion to deny leave to amend the pleadings. Novartis sought to introduce an entirely new defense shortly before the trial date and offers no persuasive reason for its delay in doing so. Stevens' counsel had clearly been trying for some time to learn whether Novartis sought to add this defense, which would plainly be a central and vigorously contested issue at trial, in an effort to prepare adequately should Novartis seek to apportion liability. We see no reason aside from an attempt to gain an advantage why Novartis should not have made clear its intention to blame Dr. Schmidt from its initial appearance in the case. Its delay in doing so until Dr. Schmidt no longer had a reason to defend herself speaks volumes. Novartis' complaint that the District Court's ruling on this issue caused it irreparable harm by "preventing it from making the case for the liability of Dr. Schmidt" is a far cry from an accurate representation of the proceedings below. Novartis easily could have made such a case, were it upfront about its intention to do so at any time in the eight months after it was joined as a party. We affirm the District Court's denial of leave to amend.

¶67 *4. Whether the District Court erred in excluding statements made in prior pleadings that were allegedly inconsistent with Novartis' liability.*

¶68 Novartis argues that it was deprived of a fair trial by the District Court's exclusion of two statements made in prior pleadings: a statement made by Stevens in her initial complaint in the present case, and a statement made by Dr. Morris in an answer filed in response to Stevens' complaint against him

before the MMLP. We will first set out the general framework governing admissibility of prior pleadings, and then address each statement in turn.

¶69 *A. Admissibility of prior pleadings in general.*

¶70 At common law, statements in pleadings were generally not admissible as evidence. This rule arose from the former nature of pleadings, which were filled with hypothetical allegations and legal conclusions framing the issues of the case in terms of numerous fictional common-law counts.[10] These pleadings served technical and discovery purposes, and statements made therein were rightly considered attributable to the attorney rather than the client on whose behalf the pleading was prepared.[11] But with the adoption of the modern rules eschewing technical pleading in favor of fact-based pleading, the underlying rationale behind the rule began to fade away. As the modern system requires parties to plead facts, the statements made in pleadings are now often considered to have evidentiary value. Modern pleadings also service a notice function and permit hypothetical and inconsistent claims, however, so some limitations do exist.

¶71 The manner in which these statements are admissible in court depends on a variety of factors. Such factors may include: whether the statements in the pleadings are sought as substantive evidence or

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[10] Note, *The Admission in Evidence of Pleadings Under the Codes and Under the Federal Rules of Civil Procedure*, 106 U. Pa. L. Rev. 98, 98 (1958).

[11] Patrick Hughes, *Evidence: Can What I Said Be Held Against Me?: Admitting Settlement Agreements and Prior Pleadings in Multiple-Defendant Comparative Negligence Actions*, 32 Washburn L.J. 260, 269 n. 58 (1993).

as impeachment evidence, whether the pleadings have been since amended or superseded, whether the pleadings were filed in the same case or in an unrelated action, or whether the statements are of fact or law, among other considerations. Admissibility is of course also subject to traditional evidentiary considerations, such as relevance, materiality, and prejudice. The common law rule barring the evidentiary use of pleadings has survived only as an exception, as some courts have declined to hold parties responsible for allegations in their pleadings when it is evident that they truly had little idea of the contents therein.[12]

¶72 *B. Stevens' statement.*

¶73 In the present suit, before Novartis was joined to the case, Stevens alleged that Dr. Schmidt was aware of the risks associated with Zometa and was negligent in failing to communicate those risks. This statement was made in Stevens' original complaint, and was repeated in her amended complaint, expert disclosures, and discovery responses to Dr. Schmidt. In the lower court, Novartis offered two rationales for the admissibility of these statements. First, Novartis argued that the statements were admissible as judicial admissions. Alternatively, Novartis argued that the positions taken in these pleadings were inconsistent with Stevens' position at trial and that Stevens

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[12] 81 Am. Jur. 2d Witnesses § 908 (2004) provides:

> As a general rule, statements made in a pleading are admissible to discredit or impeach the pleader when he or she becomes a witness . . . except where the pleader cannot be personally charged with responsibility for the allegations of the pleading, as where he or she was not aware of the contents of the pleading, or did not sign or authorize it or have knowledge of the allegations in question.

should therefore be judicially estopped from denying their veracity. We discuss these contentions in turn.

¶74 Novartis first argues that the statements made by Stevens in her prior pleadings are judicial admissions. Montana's general rule is that "allegations, statements, or admissions contained in a pleading are conclusive as against the pleader, and are admissible as against the party making them in the litigation as proof of the facts which they admit." *Meadow Lake Ests. Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 45, 341 Mont. 345, 178 P.3d 81 (quoting *Anderson v. Mace*, 99 Mont. 421, 427-28, 45 P.2d 771, 773-74 (1935)). Judicial admissions may clearly be made at "any point during the litigation process," including "during discovery, pleadings, opening statements, direct and cross-examination, as well as closing arguments." *In re Est. of Hill*, 281 Mont. 142, 149-50, 931 P.2d 1320, 1325 (1997) (quoting *Kohne v. Yost*, 250 Mont. 109, 112, 818 P.2d 360, 362 (1991)). In Montana, a judicial admission "has a conclusive effect upon the party who makes it, and prevents that party from introducing further evidence to prove, disprove, or contradict the admitted fact." *In re Raymond W. George Trust*, 1999 MT 223, ¶ 36, 296 Mont. 56, 986 P.2d 427 (quoting *DeMars v. Carlstrom*, 285 Mont. 334, 337, 948 P.2d 246, 248 (1997)). A judicial admission is not binding, however, unless it is an unequivocal statement of *fact*, as opposed to a conclusion of law or the expression of an opinion. *Id.* at ¶ 37 (emphasis added) (citing *DeMars*, 285 Mont. at 338, 948 P.2d at 249; *Kohne*, 250 Mont. at 113, 818 P.2d at 362).

¶75 In *George Trust*, we held that a statement made by a party relating to that party's ownership of an interest in trust property was a conclusion of law,

not a statement of fact, and was thus not a judicial admission. In the present case, the statements made by Stevens through her attorney were allegations made on the flawed information available to Stevens at the time, which demonstrates that they were mere expressions of opinion and conclusions of law, rather than statements of fact. "[A] judicial admission applies to facts, not to legal theories or positions." *Stanley L. and Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 34, 321 Mont. 432, 92 P.3d 620. The District Court correctly ruled that Stevens' statements made in prior pleadings were not judicial admissions because they were not statements of fact.

¶76 Novartis next contends, in the alternative, that Stevens should be judicially estopped from denying the statements made in her prior pleadings. The doctrine of judicial estoppel precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding. *Watkins Trust*, ¶ 33. Judicial estoppel applies only when: (1) the estopped party had knowledge of the facts at the time he or she took the original position; (2) the estopped party succeeded in maintaining the original position; (3) the position presently taken by the estopped party is inconsistent with its original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Id.* (citing *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 16, 307 Mont. 45, 36 P.3d 408).

¶77 We conclude that the doctrine of judicial estoppel is not applicable here. First, the present case is not a "subsequent action or proceeding"—it is the same proceeding, as Stevens correctly observes. Furthermore, there is nothing to suggest that Novar-

tis was "misled" by Stevens' alleged prior positions. Nor has Novartis shown that Stevens had knowledge of the facts surrounding Novartis' prior warnings to Dr. Schmidt at the time—to the contrary, the record suggests that Stevens believed that the failure to warn was attributable to Dr. Schmidt rather than Novartis.

¶78 Novartis also raises the argument, for the first time on appeal, that the pleadings are admissible pursuant to M. R. Evid. 801(d)(2), as statements of a party offered against a party. While sometimes referred to as "admissions against interest," statements under Rule 801(d)(2) need not be against the party's interest at the time the party made the statement, nor need be a statement of fact rather than a legal opinion or position. Kristine C. Karnezis, *Admissibility of Party's Own Statement Under Rule 801(d)(2)(A) of the Federal Rules of Evidence*, 191 A.L.R. Fed. 27, 72-78 (2003). Statements made by an attorney in prior pleadings, discovery materials, and the like are generally admissible against clients under the federal rule, which is "identical" to the Montana rule. Commn. Comments, M. R. Evid. 801(d)(2)(A); Karnezis, 191 A.L.R. Fed 27 at 170-81; *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998); *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1431-34 (10th Cir. 1990). But regardless of the strength or weakness of this theory, the trial court must be given the opportunity to weigh such an argument against traditional evidentiary considerations such as prejudice and relevance, which might still tip the scales in favor of the inadmissibility of the statement. We will not fault the District Court for failing to rule on an issue it was never given the opportunity to consider. The rule is well established that this Court will not address an issue raised for the first time on appeal.

State v. Gomez, 2007 MT 111, ¶ 21, 337 Mont. 219, 158 P.3d 442 (citing *State v. Peterson*, 2002 MT 65, ¶ 24, 309 Mont. 199, 44 P.3d 499).

¶79 For the reasons above, we affirm the District Court's exclusion of the prior statements made by Stevens concerning Dr. Schmidt's alleged culpability.

¶80 *C. Dr. Morris' statement.*

¶81 Novartis maintains that the trial court erred by excluding a statement contained in a pleading filed by Dr. Eugene Morris before the Montana Medical Legal Panel (MMLP). The response, prepared by Dr. Morris' attorney, was filed in answer to Stevens' MMLP complaint against Dr. Morris. Novartis sought to use the answer, which stated that extraction of Stevens' tooth through dental surgery was "the only realistic treatment option," to impeach Dr. Morris' trial testimony that alternatives to extraction did exist. Novartis maintains that this evidence was critical to its argument as to proximate cause, because it shows that Stevens had no option but to undergo the dental surgery, and that a failure to warn could thus not have caused Stevens' injury.

¶82 Two considerations relate to the statement's admissibility. First, the parties dispute whether the statement is admissible for impeachment purposes as a prior inconsistent statement made by Dr. Morris. The trial court supported Stevens' argument that the statement should be excluded because it was not a statement of the witness, Dr. Morris—it was a statement of the witness' attorney, unsigned by the witness, and thus could not be used to impeach the witness. Second, the parties dispute the holding in *Linder v. Smith*, 193 Mont. 20, 30, 629 P.2d 1187, 1192 (1981), a Montana Supreme Court case that

held a prior statutory bar on use of MMLP proceedings for impeachment purposes unconstitutional. Novartis maintains that the decision made all parts of the MMLP proceedings available for impeachment purposes, while Stevens asserts that the holding is limited to sworn testimony given during a MMLP hearing. We will first consider whether the statement is available for impeachment purposes as a prior inconsistent statement.

¶83 M. R. Evid. 801 provides that if a declarant testifies at trial, is subject to cross-examination, and makes a statement which is inconsistent with a prior statement, then the prior inconsistent statement is by definition not subject to the hearsay bar. Clearly, the statement made in Dr. Morris' prior pleading was inconsistent with his testimony in trial. But while some jurisdictions condition admissibility of prior pleadings on whether they are signed or otherwise verified,[13] in Montana, parties are responsible for all statements made by their attorneys within the scope of representation, whether made in pleadings or in open court. *Est. of Hill*, 281 Mont. at 149, 931 P.2d at 1325; *Kohne*, 250 Mont. at 112, 818 P.2d at 362; *Rasmussen v. Heebs Food Ctr.*, 270 Mont. 492, 496-97, 893 P.2d 337, 340 (1995).[14] We therefore conclude

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[13] For a list of cases, see Note, supra n. 10, at 100 nn. 13-14; Floyd E. Lawson, Jr., *Pleadings and Practice—Evidence—Admissibility of Pleadings into Evidence in Missouri*, 27 Mo. L. Rev. 258, 265 n. 55 (1962).

[14] Stevens' counsel stressed that the answer filed by Dr. Morris in the MMLP proceeding was informal and that Dr. Morris had little awareness of its contents, seeking (without stating as much) an exception in Montana law for situations in which the statements of counsel are *not* fairly attributed to the party. We express no opinion on the merits of such an exception—we merely observe that the position Stevens advanced, and that

that the District Court erred to whatever extent it based its decision to exclude the statement on the fact that the pleadings were prepared by Dr. Morris' attorney.[15] We will uphold the District Court if it reaches the right result for the wrong reason, however, and thus we must consider whether the statement was otherwise inadmissible, and whether any error constitutes grounds for reversal.

¶84 Dr. Morris' prior inconsistent statement arose out of the action filed against him by Stevens before the MMLP. The proceedings of the Panel are similar in form to regular court actions, but are entirely a creature of statute, separate and distinct from regular courts and the rules applicable to regular court actions. It is therefore incorrect to assume that principles applicable to standard proceedings are also applicable to MMLP proceedings, despite their outward similarity. The Act stresses that MMLP hearings are "confidential and informal," and that "the Montana Rules of Evidence shall not apply to hearings before the Panel." Section 27-6-502, MCA, Rule 15(c). It is unclear, however, to what degree the statutorily-mandated confidentiality of the proceedings overrides competing principles. In *Linder*, we severed part of the Act *sua sponte*, on the basis that it unconstitutionally infringed on the right to impeach the sworn *testimony* of a witness, by providing that "[no] statement made by any person during a hearing before the panel may be used as impeaching evidence

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the District Court apparently agreed with, is not the law in Montana.

[15] We note that the basis for the lower court's ruling on this matter is somewhat unclear, and may have included consideration of arguments advanced by counsel but not repeated on the record.

in court." *Linder*, 193 Mont. at 30, 629 P.2d at 1192. This holding involved testimony before the MMLP panel, and not pleadings in the proceeding, as Stevens correctly observes. Conversely, however, as pleadings are not specifically addressed, it is unclear whether the general confidentiality provisions of the MMLP Act would trump the right to impeach a witness with a prior inconsistent statement made in the pleadings.[16]

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[16] Our decision in *State ex rel. Hufford v. Montana Medical-Legal Panel*, 223 Mont. 73, 724 P.2d 186 (1986), provides a slight modicum of clarity on the issue. In *Hufford*, we considered plaintiffs' contention that the right to cross-examine witnesses at trial required that a transcript of MMLP proceedings be made available to them. The District Court ruled that the inability to access the transcript amounted to a denial of due process, but we reversed, explaining that "the very nature of the purpose of the Panel is advisory and therefore confidential," and that "denial of a transcript does not destroy the right of a party to fully cross-examine witnesses at trial." We cited *Linder* for the latter proposition, noting that with the exception of the stricken provision relating to witness testimony, we had upheld the constitutionality of the Act in our prior decision. *Hufford* thus suggests, without explicitly stating as much, that only the sworn testimony given during the MMLP hearing at issue in *Linder* must be exempted from the Act's overall imposition of confidentiality on the proceedings for the Act to give full effect to parties' rights to fairly cross-examine witnesses. Under this view, the proceedings would remain confidential, unless of course "no participant objects," as we recognized in *Hufford*. Ultimately, we concluded, "[w]hile a transcript of Panel proceedings would certainly assist a litigant in cross-examination at trial, it is not essential to exercise that right." *Hufford*, 223 Mont. at 76, 724 P.2d at 188. *See generally* Karlen J. Moe, *The Montana Medical Malpractice Panel Act: Origin, Procedure, and Effect*, 44 Mont. L. Rev. 281, 285-86 (1983).

¶85 Furthermore, assuming that the holding in *Linder* makes only sworn testimony available for use for impeachment purposes, it still remains unclear whether inconsistent statements made during other parts of the proceeding would be available for impeachment should they be *voluntarily* made available to opposing parties.[17] The present case suggests no clear resolution. Perhaps understandably, given the breadth and depth of other issues on appeal, the parties have focused their attention elsewhere and have made only cursory, largely unsupported arguments on this issue. As we have previously held, it is not our obligation to conduct legal research, guess at precise positions, or develop legal analysis that may lend support to the parties' positions. M. R. App. P. 23; *State v. Lewis*, 2007 MT 295, ¶ 44, 340 Mont. 10, 171 P.3d 731. Because we find that any error alleged by Novartis was harmless, we decline to dive into these unexplored waters today.

¶86 In order for the erroneous admission of evidence to constitute grounds for a new trial, the error must be so significant as to materially affect the substantial rights of the complaining party. Section 25-11-102, MCA; *Stevenson v. Felco Indus.*, 2009 MT 299, ¶ 16, 352 Mont. 303, 216 P.3d 763. Our rule is that no reversible error occurs unless the evidence in question was of such character as to have affected

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[17] In the present case, Novartis' procurement of the pleading went largely unnoticed until the last moment, as it was apparently inadvertently produced through a subpoena of Dr. Schmidt's files at deposition. The trial court did not address whether the pleading was still protected by the confidentiality provisions of the Act, or whether it was voluntarily disclosed because no objection was made by Stevens at the time. These important determinations are properly made at the trial level, not by an appellate court.

the outcome of the trial. *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. While the evidence here may well have assisted Novartis in undermining Dr. Morris' credibility, we cannot conclude that this evidence was of such character as to have affected the outcome of the trial. Dr. Morris was merely one of many medical professionals at trial who testified that there were alternatives to the surgery Stevens ultimately elected, and Novartis had ample opportunity to cross-examine both Dr. Morris and the other medical professionals, and to introduce its own evidence that no alternatives existed. Furthermore, the statement arose in an informal and confidential proceeding where Dr. Morris' counsel would be expected to file highly protective initial answers, and as such was likely of low probative value in any case.

¶87 For the reasons stated above, we affirm the District Court with respect to both the exclusion of statements made in Stevens' complaint and Dr. Morris' answer before the MMLP.

¶88 *5. Whether the District Court erred in admitting testimony regarding a change to Novartis' warning label.*

¶89 Novartis contends that it is entitled to a new trial because the trial court erroneously admitted evidence of a change to Novartis' Zometa warning label, allegedly in order to demonstrate that Novartis should have given the later warning *prior* to the surgery. Novartis argues that the evidence is inadmissible under M. R. Evid. 407, which provides that evidence of subsequent remedial measures is "not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning instruction." Novartis asserts

that the trial court erred in permitting Nurse Joni Landes, Dr. Schmidt's office manager, to testify to a change in the label, and contends that Landes' testimony was offered as "proof that [Novartis'] prior warnings were not adequate."

¶90 Stevens paints a starkly different picture. She responds that the "remedial measure" testified to by Landes, and complained of by Novartis, was actually a change in Guardian Oncology's office protocol, not a change in Novartis' label. Stevens asserts that any reference to Novartis' later label was in passing and not offered as substantive evidence. Furthermore, asserts Stevens, M. R. Evid. 407 is not applicable here because it only governs subsequent remedial measures taken by a *party*, not a non-party such as Guardian Oncology, in keeping with the premise of the rule: to dissuade parties from failing to remedy dangerous situations out of fear that their remedies will be seen as admissions of guilt. Lastly, Stevens asserts that even had the remedial measure been Novartis', it was not admitted to show liability, but rather to show that adequate warnings *would* have been passed on to Stevens were they given to Dr. Schmidt—a point which Novartis vigorously disputed.

¶91 We agree with Stevens that two distinct remedial measures are referenced by the parties. The first is the change in Novartis' warning label in February 2005, which more explicitly warned about the risk of ONJ. The second is the change in Guardian Oncology's office protocol for patients at risk of ONJ, also initiated in February 2005. We agree with Stevens that M. R. Evid. 407 is not applicable in the latter situation, and thus any evidence of the change in Guardian Oncology's office protocol is not prohi-

bited by the rule. Evidence of Novartis' subsequent change in label, however, if offered to demonstrate the insufficiency of the warning that was given at the time of the surgery, *would* conceivably fall within the prohibition of the rule.

¶92 On closer examination of the trial transcript, it is clear that Novartis significantly mischaracterizes the uses to which Stevens put evidence of Novartis' changed label. While it is true that Landes did reference Novartis' change in label in early 2005, she did so only when contrasting information freely available in 2005 to information on the label at the time of Stevens' dental surgery in 2004, in an attempt to explain why Guardian Oncology had changed its office protocol. Landes explained that she initiated the change in office protocol as a result of receiving an Oncological Nursing Society bulletin detailing the risk of ONJ, which she received *before* Novartis changed its label. The change to the label was referenced only to provide chronological context for the receipt of the Nursing Society bulletin. Furthermore, Landes' testimony was introduced in order to rebut Novartis' argument that even if Guardian Oncology had received adequate warnings, the warnings would not have been passed on to patients like Stevens. Thus, while it is true that Landes spent some time discussing a remedial measure, and true that she did reference Novartis' change in label, it is not at all accurate to portray Landes' testimony as an attempt to introduce evidence of a subsequent remedial measure on Novartis' part. Novartis' attempt to conflate the clinic's change in procedure with Landes' brief reference to the changed label is entirely unpersuasive.

¶93 We conclude that the District Court correctly ruled that M. R. Evid. 407 was not applicable here. M. R. Evid. 407 does not prohibit evidence of subsequent remedial measures taken by non-parties. Nor does it prohibit "evidence" of a change in Novartis' package insert, in this case. Stevens did not use the subsequent label to show negligence or need for a warning, and thus the evidence is not prohibited by the rule. Rather, Stevens referred to the subsequent Zometa label only in passing while discussing the change in Guardian Oncology office protocol. It was not offered as substantive evidence. Novartis' argument on this issue is utterly misleading and without merit.

¶94 We affirm the District Court.

¶95 *6. Whether Novartis is entitled to judgment as a matter of law because Stevens failed to prove proximate causation.*

¶96 Novartis contends that Stevens failed to present evidence establishing proximate cause, because Stevens did not show that there were any options available to treat her fractured tooth that would have prevented her from developing ONJ. Given that Stevens needed an invasive dental procedure, Novartis argues, she did not show that the *specific* procedure undertaken was any more likely to cause ONJ than other procedures, such as crown lengthening, that might have been undertaken.

¶97 Stevens responds by summarizing the testimony of several experts called at trial. She contends that this expert testimony clearly shows that other procedures were available, and that the injury which caused her ONJ would not have occurred were she to have undergone these procedures. While we are sympathetic to the fact that the other procedures

available to Stevens also carried a risk of ONJ, the unstated premise of Novartis' argument is that because all procedures carried some risk of ONJ, it would be *impossible* for Stevens to establish proximate cause. We do not agree. Expert testimony at trial showed that the trauma caused by tooth extraction caused Stevens' ONJ, and that this particular trauma to Stevens' jawbone would have been avoided by choosing less invasive options. The testimony also showed that Dr. Morris would not have undertaken the tooth extraction if he had known of the risks of ONJ in Zometa patients such as Stevens. Stevens offered evidence of all links in the causal chain. We affirm the District Court.

¶98 *7. Whether the District Court erred in refusing Stevens permission to amend her complaint to include a claim for punitive damages.*

¶99 On cross-appeal, Stevens claims that the District Court abused its discretion by not allowing her to amend her complaint to include a claim for punitive damages. Stevens previously petitioned this court for a writ of supervisory control on this issue, which we denied. The trial court ruled that to allow amendment of the pleadings at the time Stevens' petition was filed would unduly prejudice Novartis, because the entirely new issue of intent would be raised by a punitive damage claim.

¶100 While Stevens claims that the allegations would "not require additional time by [Novartis] to defend because they arose out of the same operative facts which served as the basis for [Novartis'] liability," it is immediately apparent that this is not the case. Defending against a charge of actual fraud or actual malice would have required Novartis to address an entirely new argument, and the facts

related to such an argument would *not* be the same as those already at issue. The defense would have taken careful preparation and would have involved substantial discovery, and Novartis could not have adequately prepared in the three weeks before the end of the discovery period. The District Court had a legitimate interest in ensuring an efficient progression to the trial date, and we conclude that it did not abuse its broad discretion to deny leave to amend. The matter of amendment "rests within the sound discretion of the trial court, and its action will not be reversed in the absence of an affirmative showing of abuse of that discretion resulting in prejudice." *Deschamps v. Treas. St. Trailer Ct., Ltd.*, 2010 MT 74, ¶ 18, 356 Mont. 1, 230 P.3d 800 (quoting *Callan v. Hample*, 73 Mont. 321, 326, 236 P. 550, 551-52 (1925)). No prejudice exists here. Stevens had ample time to alert Novartis to this claim and did not do so, and was thus properly prevented from adding it at the eleventh hour.

¶101 We affirm the District Court.

¶102 *8. Whether the District Court erred in offsetting social security disability benefits against the general damages awarded by jury.*

¶103 Our final inquiry concerns whether the District Court erred in offsetting social security disability benefits from general damages. Stevens observes that under § 27-1-308, MCA, a plaintiff's recovery may only be reduced by "collateral sources," defined in § 27-1-307, MCA, as ". . . something that is later included in a tort award and which is made to or for the benefit of a plaintiff . . . ." As the jury only awarded general damages, Stevens argues, it is impossible to determine whether the damages that Novartis seeks to offset were included in the jury

verdict. Novartis counters that the trial court correctly included all amounts "paid or payable" under the statute, and that the verdict was properly reduced.

¶104 Our decision in *Busta v. Columbus Hosp.*, 276 Mont. 342, 916 P.2d 122 (1996), controls resolution of this issue. In *Busta*, the defendant hospital sought to offset benefits received by the plaintiff from the Veterans' Administration against the damages awarded in the plaintiff's wrongful death action. As here, the jury was instructed that its award could include damages for economic loss, reasonable compensation for mental anguish, and loss of "comfort, guidance, . . . care, protection and companionship," among other compensable losses. The jury returned a verdict with a single amount for all damages, without any breakdown of damages allotted to each of the losses. We held that without a breakdown of damages attributable to each loss, the lower court could not have properly determined how much of the award was attributable to damages for which the plaintiff would be compensated by collateral sources, as would be a prerequisite for any offset. Section 27-1-308, MCA, allows offsets only against "that part of a recovery which . . . [is] compensated by a collateral source." Thus, we concluded, ". . . there was no method by which the District Court could calculate what, if any amount, the hospital was entitled to offset by the amount of . . . benefits awarded," and no offset could be applied. *Busta*, 276 Mont. at 375, 196 P.2d at 142.

¶105 Here, as in *Busta*, the jury verdict does not set out what portion of its damage award is attributable to items subject to collateral source offsets—in this instance, losses due to diminished wage-earning

capacity, for which Stevens will be compensated by social security disability benefits. Without this "line-item" breakdown of the damages awarded by jury, the District Court could not have complied with the mandate of § 27-1-308, MCA, that jury awards may only be reduced by amounts attributable to losses which are compensated by collateral sources. There was no basis on which to conclude that the disability benefits would compensate Stevens in whole or in part for damages which were included in the jury's award. Without a factual basis for the offset, the District Court erred in concluding that Novartis was entitled to offset the jury award by Stevens' disability benefits. No offset should have been permitted.

¶106 For the reasons above, we reverse the judgment of the District Court as to the social security disability benefits offset, and remand for further proceedings consistent with this opinion.

¶107 *9. Whether the District Court erred in dismissing Stevens' negligence claims against Patrick Doyle, a sales representative for Novartis.*

¶108 Because we affirm the District Court on issues 1 through 7, we need not consider this issue.

¶109 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/S/ W. WILLIAM LEAPHART

We concur:

/S/ MIKE McGRATH
/S/ JAMES C. NELSON
/S/ PATRICIA COTTER
/S/ MICHAEL E WHEAT
/S/ BRIAN MORRIS
/S/ JIM RICE

Supreme Court, U.S
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No. 10-1196

In The Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner,

v.

PEGGY L. STEVENS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Should this Court grant certiorari where the Petitioner failed to raise a federal issue to the Montana state courts and where no federal issue was decided?

2) Where the decision of Montana's highest court is based solely on state law grounds, does this Court possess jurisdiction to grant this petition for certiorari?

3) Even if the Petitioner had properly raised a federal issue in state court, should this Court grant certiorari where Petitioner fails to identify any prejudice, unfairness, or lack of due process as a result of being named a party-defendant in this lawsuit just three years and ten months after Respondent became aware of her injury and within a few months of when she first learned that Petitioner was responsible for her injury?

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STATEMENT OF THE CASE

A. Introduction

After a week-and-a-half long jury trial, Peggy Stevens was awarded damages from Novartis Pharmaceuticals Corporation for failure to warn her that she could develop debilitating osteonecrosis of the jaw following a dental procedure while receiving its drug, Zometa. During the trial and on appeal to the Montana Supreme Court, Petitioner raised only garden variety issues of state tort law. The Montana Supreme Court issued a well reasoned and carefully limited opinion addressing those tort issues, including state law on the statute of limitation and tolling. There was no federal issue raised or decided in the courts below and no colorable federal issue for this Court to decide.

B. Factual Background

On January 18, 2008, Peggy Stevens filed a timely complaint in state district court in which she alleged that after being diagnosed with follicular lymphoma in October, 2000, she was treated with Zometa from April of 2002 through March of 2005 (Comp., ¶¶5, 6). She alleged that on September 27, 2004, she had a tooth extracted after which she developed mandibular pain which was diagnosed as osteonecrosis of her right mandible (ONJ) on March 18, 2005 (Comp., ¶¶8, 9, 10). She alleged that her oncologist was negligent for failing to advise her of the need to avoid tooth extractions while being treated with

Zometa and that that negligence was the cause of her ONJ and resulting damages. (Comp., ¶¶11, 12, 16 and 18)

The complaint also named as defendants, "John Does 1 through 5" and alleged that they were other individuals or entities whose conduct may have contributed to plaintiff's injuries but who were then unknown to the plaintiff. (Comp., ¶4)

C. Procedural History

On January 13, 2009, after learning that her physician had not been fully informed about the risks from Zometa,[1] Respondent amended her complaint to substitute the Petitioner, Novartis Pharmaceuticals Corporation, for John Doe 2 and added an alternate allegation that if Petitioner had not provided timely notice to her oncologist about the potential for ONJ from a tooth extraction while being treated with Zometa, then Petitioner was negligent and was the cause of her injury. (Comp., ¶20)

Petitioner moved that the amended complaint against it be dismissed based on Montana's three-year statute of limitation for personal injury actions.

---

[1] Information regarding what Petitioner actually knew about the drug's risks compared to what doctors had been told was concealed by a confidentiality order which was a condition to discovery in federal multi district litigation (*In re Aredia and Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760 (M.D. Tenn. Aug. 16, 2006)).

(2/26/09 Mtn., 2) It argued that because her condition was diagnosed on March 18, 2005, and because the statute began to run when she discovered the cause of her injury, the statute expired in March of 2008 and that her amendment to substitute it for a fictitious John Doe defendant, as authorized by §25-5-103, Mont. Code Ann. ("MCA") did not relate back to the original complaint because the plaintiff was aware of its identity at the time of the original complaint. (12/26/09 Brf., 2-7) ***Petitioner did not argue that its ability to defend itself had in any way been impaired by its addition as a party ten months after it complained the statute had run and made no suggestion that its right to due process was implicated.***

Based on the applicable authorities, the state district court agreed with Stevens that §25-5-103, MCA allowed relation back to the original complaint if she had previously been unaware of Petitioner's connection to her injuries and denied its motion to dismiss or in the alternative for summary judgment. (Order, 4/8/09, 3-6)

Nevertheless, Petitioner renewed its motion for summary judgment based on the statute of limitation shortly prior to trial, five months later. Petitioner's arguments were identical and, once again, ***omitted any suggestion that its defense had been impaired or that its right to due process had in any other way been affected when it was substituted as a defendant ten months after it contended the statute of limitation had run***. (9/11/09

NPC Brf. 8-14) In response, Respondent cited the court to the same authorities on which she had previously relied. She also contended that, in any event, the statute of limitation was tolled during the pendency of previous class actions, at least one of which sought identical relief from the same defendant, and that after deducting the tolled time period, her complaint was timely with or without the fictitious defendant statute. (9/28/09 Resp., 16-19) She cited the district court to *Anderson, et al. v. Novartis Pharmaceuticals Corporation*, No. 3:05-0719 (M.D. Tenn.), filed on September 15, 2005, and dismissed twenty-six months later on November 14, 2007.[2]

Although there was no Montana case on point, Respondent cited *American Pipe and Construction Company v. Utah*, 414 U.S. 538 (1974); and *Crown, Cork and Seal Company v. Parker*, 462 U.S. 345 (1983) for the principle that tolling pending a class action is a reasonable compromise between the interest in timely notice served by statutes of limitation and the judicial economy furthered by Rule 23, Fed. R. Civ. P., which authorizes class actions. She cited

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[2] As pointed out by Petitioner on p. 15 of its reply brief submitted to the Montana Supreme Court, three substantially identical class action suits were filed against it on the same day. *Anderson* pertained to patients who received both Zometa and Aredia. *Becker v. NPC*, No. 3:05-0719 (M.D. Tenn.) pertained to plaintiffs who had received only Zometa and included allegations about failure to warn identical to those in this case. It is the *Becker* case on which the Supreme Court of Montana relied to toll the statute of limitation.

Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1985) for the principle that tolling applies whether class certification is granted or denied, and *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 963 (N.J. Super. Ct. App. Div. 1999) to demonstrate that most state courts to consider this issue have held that the pendency of a putative class action which does not achieve class status tolls the applicable statute of limitation for the benefit of any individual claimant who would have been a class member if the class had been certified. (9/28/09 Resp., 17-19)

Petitioner filed a reply brief in support of its motion for summary judgment based on the statute of limitation. Its argument was threefold: 1) several states, including those cited to this court, had rejected the idea of tolling a state action based on a federal class action; 2) plaintiff was not within the class sought to be certified in the *Anderson* case which she cited (although it acknowledged she would have been a member of the class for which certification was sought in the *Becker* case); and, 3) that tolling should not result from tort class action due to the unlikelihood that typicality can be satisfied pursuant to Rule 23(a).[3]

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[3] However, Petitioner incorrectly attributed that conclusion to the California Supreme Court, citing *Jolly v. Eli Lilly & Co.*, 751 P.2d 923 (Cal. 1998) as it continues to do in its petition, even though *Jolly* was decided on other grounds. *Infra*, at 11.

More important is what Petitioner did not argue. ***At no point in response to the plaintiff's tolling argument did Petitioner claim that its defense was in any way impaired by delay, that its constitutional right to due process was implicated, or that the issue should be resolved on the basis of any federal law.*** (10/1/09 Reply) Nor did it do so when the motion was orally argued. (Trans., 135-140) Therefore, there was no discussion of how, if at all, Petitioner's defense had been impaired by delay. And no evidence suggests that it was.

The state district court held that no new evidence had been presented which justified departure from its previous order denying Petitioner's motion for summary judgment. (10/18/09 Order, 6)

Petitioner had a third opportunity to make its due process argument in the state trial court when jury instructions were settled. The Respondent objected to Petitioner's proposed jury instructions related to the statute of limitation issue based on her contention that it was a legal issue to be decided by the court. (Trans., 1783) She specifically relied on putative class action tolling as part of her objection to the instructions (Trans., 1783), however, Petitioner made no response to that argument and, once again, did not suggest that its ability to defend itself had been in any way impaired, that its right to due process was at issue, or that any other federal law was implicated. (Trans., 1784-1785)

Petitioner filed a post-trial motion for judgment as a matter of law which again argued the statute of limitation but which raised no federal issue and did not mention its right to due process. (11/4/09 Mtn., 2-6 and 12/7/09 Reply, 5-6)

This extensive discussion of the procedural history is necessary for two reasons. First, the trial court was never given an opportunity to consider whether, in fact, evidence or testimony was lost due to delay because it was never alleged. Second, in Montana, as in most jurisdictions, an objection or claim cannot be raised on appeal unless first asserted in the trial court. *In re T.E.*, 2002 MT 195, ¶¶20-21, 311 Mont. 148, 54 P.3d 38; *State v. Benson*, 1999 MT 324, ¶19, 297 Mont. 321, 992 P.2d 831. The Montana Supreme Court has held that it would be unfair to fault a trial court for something it was not given an opportunity to consider. *Stanton v. Wells Fargo Bank Mont., N.A.*, 2007 MT 22, ¶35, 335 Mont. 384, 152 P.3d 115.

Accordingly, Petitioner did not raise a federal issue, not to mention denial of due process, on appeal to the Montana Supreme Court. Attached as App. 1-25 are its table of contents, list of authorities, statement of the issues, and the entirety of its statute of limitation argument from its opening brief to the Court. They demonstrate that a federal issue is not raised and the Fourteenth Amendment of the United States Constitution is not even cited in the Table of Authorities. In fact, Petitioner did not raise the tolling issue at all in its opening brief

on appeal. It waited to address the issue until its reply brief to which Respondent had no opportunity to respond. In Montana, new issues cannot be raised in a reply brief. *Kulstad v. Maniaci*, 2010 MT 248, ¶22, 358 Mont. 230, 744 P.3d 722.

However, even in the reply brief, its current argument that tolling based on a personal injury class action precludes preserving evidence in violation of basic due process guarantees is nowhere to be found. The only mention of the Fourteenth Amendment in its Table of Authorities cited to p. 18 which related to its duty to warn and had nothing to do with the tolling issue.

Petitioner contended in post-appeal arguments to the district court that it raised a due process issue in its reply brief when it cited *Gibson v. Am. Cyanamid Co.*, No. 07-C-864, 719 F. Supp. 2d 1031, 2010 WL 2465498, at *2 (E.D. Wis. June 15, 2010) for its suggestion that because the state in which the *Becker* class action was pending (federal district court in Tennessee) did not recognize cross-jurisdictional tolling, due process would be implicated if Montana treated the class action differently. However, even there, Petitioner made no argument that tolling based on a personal injury class action precludes defendants from preserving evidence in violation of basic due process guarantees. Nor did *Gibson* have anything to do with class action tolling. It simply addressed retroactive imposition of substantive liability on a party based on the risk contribution rule, even though the party had no proven connection to the cause of the

plaintiff's injuries and that case had no evident connection to any issue in this case.

For these reasons, a review of the Montana Supreme Court's opinion in this case will reveal no discussion of the Fourteenth Amendment, due process, or any other federal rule of law. It simply cited reasoning from non-binding federal decisional law which includes no discussion of due process.

Ms. Stevens argued that Petitioner's entire tolling argument was improperly raised for the first time in its reply brief and moved that the entire portion of the reply brief be stricken or in the alternative that oral argument be scheduled so that a full response could be made. The Supreme Court granted oral argument – a rare occurrence in Montana. ***At no time during oral argument was due process mentioned by Petitioner.*** Its new due process argument is a complete afterthought.

Nor do any of the conflicting authorities cited by Petitioner from other jurisdictions discuss a statute of limitation or tolling as implicating due process and the Fourteenth Amendment or any other federal law.

D. Applicable State Law

Although they did not raise a federal issue, Petitioner made a number of similar policy arguments in its reply brief to those made in its petition. It argued that "most states that have considered the concept (cross jurisdictional tolling) have rejected it." That

argument was incorrect. Appellate courts in eight states had considered and decided the issue, four had allowed cross-jurisdictional tolling. *See Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967, n. 4 (N.J. Super. Ct. App. Div. 1999); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002); *Lee v. Grand Rapids Board of Education*, 384 N.W.2d 165, 168 (Mich. App. 1986); and *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382 (Mo. Ct. App. 1990).[4]

Courts in four states had rejected cross-jurisdictional tolling. *See Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa. Super. 2002); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000); and *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App. 1995).[5]

The remainder of the 41 cases cited by Petitioner fall into one of several categories. Some are federal court decisions where the court declined to apply cross-jurisdictional tolling in a diversity action because there were no prior decisions in the states where the cause of action arose one way or the other and the federal court declined to decide the issue for the state. *See, e.g., Bozeman v. Lucent Technologies,*

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[4] As noted, none of these cases were based on an issue of federal law.

[5] Neither were any of these cases decided based on an issue of federal law. All eight cases were decided as a matter of state tolling policy.

Inc., No. 2:05 CV 45 A, 2005 WL 2145911, at *3 (M.D. Ala. Aug. 31, 2005).

In a number of cases cited by Petitioner, the court refused to toll the statute of limitation for reasons unrelated to the issue of cross-jurisdictional tolling. *See, e.g., Love v. Wyeth*, 569 F. Supp. 2d 1228, 1236 (N.D. Ala. 2008) (national class action was "facially spurious.")

Other cited cases simply applied those four cases in which Respondent acknowledges that cross-jurisdictional tolling has been rejected to cases arising in the four states in which it has been rejected. *See, e.g., In re Vioxx Products Liability Litigation*, 522 F. Supp. 2d 799, 815 (E.D. La. 2007).

Petitioner also argued before the Montana Supreme Court as it does in its petition that California rejected class action tolling in *Jolly v. Eli Lilly & Co.*, *supra*, in all actions involving mass torts. However, the court in *Jolly* held that the class action in that case, which sought only monitoring, did not toll the statute of limitation in the individual plaintiff's personal injury action because the defendant would not have been on notice of an entirely different claim based on the class action. (*Jolly*, 751 P.2d at 937) The court pointedly did not address whether any personal injury mass tort filing could serve to toll a statute of limitation for putative class members after certification is denied for lack of commonality. (751 P.2d at 937) On the other hand, other courts which have addressed the issue, e.g., *Hyatt Corp. v. Occidental Fire*

& Cas. Co., 801 S.W.2d 382, 384 (Mo. Ct. App. 1990); *Staub v. Eastman Kodak Co.*, 726 A.2d 955 (N.J. Super. Ct. App. Div. 1999); and *Vaccariello*, *supra*, were all mass tort cases in which tolling was applied in each of the respective states.

Most importantly for purposes of this court's jurisdiction, ***none of the nine states, now including Montana, which have directly decided the issue of cross-jurisdictional tolling based on class actions, including those which have based their decision on class actions for personal injury torts, have based their decision on any federal law or even discussed the potential application of due process protections***.

E. The Montana Supreme Court Opinion Does Not Support Certiorari

In a well reasoned and analytical opinion, the Montana Supreme Court in *Stevens v. Novartis Pharmaceuticals Corporation*, 2010 MT 282, 358 Mont. 474, 247 P.3d 244 (Pet. App., 1a-55a) held that Petitioner had been fairly notified of the claims being made against it by the *Becker* class action filed in Tennessee, that no prejudice had been demonstrated by the ten-month delay it alleged had occurred before it was added as a defendant in this case, and that, therefore, based on the facts presented in this case, the Montana statute of limitation had been tolled for the period of time during which the *Becker* action was

pending and Respondent's action was not barred by Montana's statute of limitation.

The Montana Supreme Court noted in response to Petitioner's statute of limitation argument, that both the fictitious defendant statute and tolling had been raised as issues. (Pet. App., 10a-11a) It held that the district court would be affirmed if Petitioner was properly substituted as a fictitious defendant or that limitations had been tolled during the pendency of the *Becker* class action, but after careful consideration of the arguments raised, chose to decide the case based on tolling and, therefore, did not reach the fictitious defendant issue. (Pet. App., 12a)

The Montana Supreme Court could have decided this case on an alternate basis had a persuasive argument been made that federal law, including the Fourteenth Amendment, was implicated by tolling. However, that argument was never raised and never considered.

In its analysis of class action tolling, the Supreme Court discussed *American Pipe*, *supra* (Pet. App., 12a-15a) and Petitioner's contentions that mass torts were generally unsuited to affect class action tolling and that the better reasoned authorities reject cross-jurisdictional tolling. (Pet. App., 15a-16a)

In response to its claims that it had not been afforded proper notice, the Court stated that:

> While we may later encounter a situation in which a class action suit does not afford

> sufficient notice to the defendants of subsequent plaintiff's claims, we do not believe we are faced with such an instance today. Novartis' alleged failure to warn, and the injury caused as a result, serve as the underpinning for both the class action suit and Stevens' claim, and the warnings issued by Novartis to healthcare professionals around the country were presumably the same or substantially similar.
>
> . . . We are not convinced that the nature of the individual plaintiff's claims in *American Pipe* and its progeny were of substantially greater variance than the nature of the plaintiff's claims in the *Becker* class action. Under modern pleading rules, Novartis is only entitled to be noticed of the nature of the claim, rather than the damages alleged, which need not be pleaded specifically. The argument that mass torts are unsuited for class action tolling seems to afford too little weight to the critical distinction between variance in damages and variance in the nature of the claims. We are unpersuaded that mass torts are unsuitable for class action tolling. We conclude that Novartis was effectively put on notice of Stevens' claim by the *Becker* suit, and allowing class action tolling in this context would not unfairly prejudice Novartis for lack of notice.
>
> (Pet. App., 17a-18a)

With regard to Petitioner's claim that tolling should not apply cross jurisdictionally, the Court

noted that its characterization of what other courts have done was exaggerated because,

> . . . in reality the doctrine has seldom been squarely addressed, and it is clear that its outlines are still in the process of developing. Many of the cases Novartis cites as "rejecting" the doctrine, for example, are merely circuit court decisions looking to existing state law, finding no authority one way or the other, and declining to decide the issue without guidance from the state's highest court. (citation omitted) . . . (Pet. App., 19a)

The Montana Supreme Court then went through an assiduous nationwide analysis of decisional law on the issue (Pet. App., 19a-22a) before noting that Respondent's claim was filed only ten months after the alleged expiration of the limitations, in stark contrast to the drastic scenarios forecast by Petitioner and courts from other jurisdictions (Pet. App., 22a), and that decisions adopting cross-jurisdictional tolling had more effectively balanced the considerations at issue. (Pet. App., 22a)

Finally, the Court observed in response to similar doomsday predictions by Petitioner that, " . . . the best judge of these competing arguments will be experience." (Pet. App., 25a) And, most importantly for purposes of the argument currently being made by Petitioner, held that:

> We recognize that in some instances a class action suit may *not* fairly put the defendants on notice. **Our adoption of the rule is**

> **therefore limited to situations in which defendants are fairly put on notice of the substantive claims against them.** Were we confronted with a case such as that faced by the California Supreme Court in *Jolly*, where the individual claim sought damages for personal injuries but the class action suit sought only monitoring, we would likely not see fit to extend the doctrine. (citation omitted) Similarly, the present case involved an alleged limitations failure of under a year. Were we to confront a situation such as the one faced by the *Portwood* court – where the class action suit was alleged to have tolled the statute of limitations for over a decade – we might find the principles of notice in fairness to defendants not met and the doctrine inapplicable. **Thus, before tolling the statute of limitations during the pendency of a class action suit, we must examine the circumstances present in the case to ensure that defendants are not unfairly prejudiced, regardless of the jurisdiction in which the actions are filed.** On the facts before us today, we conclude that tolling our state statute of limitations best upholds the competing policies at issue. (Pet. App., 26a-27a) (emphasis added)

Nowhere did the Montana Supreme Court opinion related to that state's statute of limitation address the due process clause of the Fourteenth Amendment to the U.S. Constitution or any other federal issue and, based on the highlighted language, the opinion can never implicate the

right to due process because it only applies when a defendant has adequate notice of the claim against it.

In a thoughtful opinion, the Court carefully accounted for all the onerous scenarios and potentially unfair outcomes that are forecast by Petitioner by holding that if those circumstances are ever presented to the Court, it reserves the right to come to a different conclusion. Its decision was simply a common sense application of the law based on the facts in this case.

ARGUMENT

I.

In The State Court Proceedings, Petitioner Did Not Raise A Constitutional Challenge To Cross-Jurisdictional Tolling Nor Establish Any Factual Record On Which To Consider It. It Cannot Raise That Issue For The First Time By Petition To This Court.

Supreme Court Rule 14(1)(g)(i) of this Court requires, when review is sought of a state court judgment, that a petition specify,

> . . . the stage in the proceedings both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions

> of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this court has jurisdiction to review the judgment on a writ of certiorari. . . .

Supreme Court Rule 14(1)(i)(v) requires that the part of the record necessary to demonstrate when and how the federal issue was raised be included in the petition's appendix.

Petitioner has not complied with either requirement because it did not raise a federal question in either state district court or on appeal to the state supreme court. This alone requires denial of its petition.

Petitioner states on p. 7 of its petition that the court did not address its argument that application of class action tolling here would violate due process. That's because it didn't make that argument. Nor did it ever assert much less establish that because the action was tolled for ten months, it was precluded from "timely preservation of evidence and testimony critical to presenting an effective defense," which it contends on p. (i) is now the issue which this court should address. In fact, all of plaintiff's medical records and financial data were completely preserved, discovery by co-defendants was ongoing for a year prior to Petitioner's involvement, no witness had become unavailable, and Novartis was given the opportunity to duplicate any discovery which it felt

had not been adequately completed, an opportunity of which it availed itself in excess.

With "very rare exceptions," *Adams v. Robertson*, 520 U.S. 83, 86 (1997) quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992), this Court adheres to the rule in reviewing state court judgments under 28 U.S.C. §1257(a), that it will not consider a Petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision it has been asked to review. *Id.* As in *Adams*, the State's highest appellate court has not expressly addressed the constitutional question raised by Petitioner here to justify the grant of a writ of certiorari.

This rule protects the interest of comity between the state courts and the Supreme Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In *Adams*, this Court explained that:

> "[I]t would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S. at 500 . . . Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Illinois v. Gates*, 462 U.S. 213, 221-222 (1983).

520 U.S. at 91.

Moreover, when the highest state court is silent on a federal question now presented to this Court, this Court rightly assumes that the federal issue was not properly presented to the state court. *Adams*, 520 U.S. at 86-87, citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of overcoming this assumption by demonstrating that the state court had an opportunity to address the federal question now presented by Petitioner to this Court. *Board of Directors*, *supra*. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Petitioner states that its constitutional right to due process is implicated by its inability to timely preserve evidence and testimony critical to an effective defense. Because it did not make that argument in state court and presented no examples in state court of how its defense was impaired, even though repeatedly given the opportunity to do so, this court's consideration of the argument would be based on mere speculation and abstract possibilities which have already been ruled out by the plain language of the Montana Supreme Court decision.

What Petitioner seeks is clearly what this Court has stated it will not give – an advisory opinion. For these very reasons, its constitutional argument has been waived and this case does not warrant review by this court.

II.

The State Court Judgment Rests Solely On Independent State Court Grounds And Presents No Federal Issue For Review.

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-26. Thus, jurisdiction before the Court is presumed to exist only if it is not clear that the state court relied on independent and adequate state grounds, and when it fairly appears that the state court rested its decision primarily on federal law. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Even a cursory review of the opinion of the Montana Supreme Court reveals that *none* of its reasoning can possibly be categorized as resting primarily on federal law.

This Court has placed parameters on those cases over which it will exercise jurisdiction by writ of certiorari to a state's highest court in Rule 10. There it states that:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:

> a) . . .
>
> b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

The Montana Supreme Court did not decide a question of federal law. Neither have those states which have rejected cross-jurisdictional tolling done so based on a question of federal law. Therefore, there is no issue of federal law that can be "settled by this court."

This Court has always held that statutes of limitation applicable to state causes of action as well as the law for tolling time periods are issues of state – not federal law. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 394 (2007). *See also*, *Hardin v. Straub*, 490 U.S. 536, 542-43 (1989) (holding that lower federal courts should have applied a Michigan statute that suspended the limitations period for prisoners under disability in a civil rights action); *Great Western Tel. Co. v. Purdy*, 162 U.S. 329, 339 (1896) ("[t]he limitation of actions

is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions . . . [t]he question at what time the cause of action accrued in this case, within the meaning of the statute of limitation of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the State cannot be reviewed by this court"); *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (Court looks to state law to supply a statute of limitation for a missing federal limitations period).

In *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980), the Court reviewed the contention that a 42 U.S.C. §1983 action was barred by New York's 3-year limitations statute. The District Court and the Court of Appeals had rejected the defense by relying on a "federal tolling rule" not contained among the tolling provisions the state legislature had codified with its limitations periods. *Tomanio*, 446 U.S. at 482, 486. The Court reversed, holding that limitations periods in §1983 suits are to be determined by reference to the appropriate "state statute of limitations and the coordinate tolling rules." *Tomanio*, 446 U.S. at 484. New York's legislative choices in this regard were therefore "binding rules of law." *Tomanio*, 446 U.S. at 484. Since the State's rules did not defeat either §1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism, the

Court held that Tomanio's suit was time barred. *Tomanio*, 446 U.S. at 488-92.

In *Olympia Mining & Milling Co. v. Kerns*, 236 U.S. 211 (1915), the Court refused to hear plaintiff's argument that the Idaho Supreme Court's decision that the statute of limitation barred a company's action against a property owner to enforce a trust agreement adversely affected its due process rights because no federal question was raised or even remotely suggested to the lower court.

The result in this case can be no different. Because statutes of limitation for state causes of action are issues of state law, the circumstances under which those statutes are tolled present an issue of state law. That is all that was decided by the Montana Supreme Court. Therefore, no federal question has been presented and Petitioner has not shown a jurisdictional basis for its petition.

III.

Petitioner Has Not Presented Any Authority To Support Its Argument That Montana's Statute Of Limitation Or Circumstances For Tolling That Statute Gave Rise To A Violation Of Due Process.

Nowhere in its petition does it describe the rights guaranteed by due process or how it has been denied those rights when it was substituted as a party to timely-filed litigation.

The requirements for procedural due process are reasonable notice and an opportunity for a hearing appropriate to the nature of the case. *See Jones v. Flowers*, 547 U.S. 220, 226-27 (2006) and *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972). Procedural due process is a "guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113 (1990); *see also, Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process is a "flexible" concept calling only "for such procedural protections as the particular situation demands").

Since there is no allegation of arbitrary governmental authority which would implicate substantive due process rights, Petitioner is presumably complaining that under some circumstance that could occur in the future, but has not been demonstrated in this case, cross-jurisdictional tolling based on a tort class action could result in denial of procedural due process. However, if that hypothetical situation could occur, there has been no demonstration that it occurred in this case, nor could it ever occur in Montana based on the plain language of the Montana Supreme Court decision.

Petitioner had reasonable notice of the allegations against it, an opportunity to investigate through extensive discovery the merits of those claims, and a week-and-a-half long trial at which to defend itself based on the facts that it discovered.

All that Petitioner contends is that because it wasn't joined in this action for three years and ten

months after Peggy Stevens discovered the nature of her injury, it was treated unfairly. However, the result would have been the same under Montana's tolling statute. *See* §27-2-102(3), MCA (if the facts are concealed or self-concealing, a "period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party"). The result would have been the same based on the interpretation of Montana's fictitious defendant statute, §25-5-103, MCA, by the California Supreme Court and the state district court in this case. And, actual notice to Novartis of this individual claim could have been postponed even further had plaintiff chosen to avail herself of the right pursuant to Rule 4(E), M.R.Civ.P. to serve her complaint and summons at any time within three years from commencement of a timely action.

Petitioner's contention that it was denied due process by being joined in this action ten months beyond the period of three years ignores the fact that in other jurisdictions, it could have been named in an action months or years later.

Other states have longer statutes of limitation for personal injury actions. Florida, Nebraska, Utah and Wyoming have four year periods: Fla. Stat. §95.11(3); Neb. Rev. Stat. §25-207; Utah Code Ann. §78-12-25; Wyo. Stat. §1-3-105. Missouri has five years. Mo. Rev. Stat. §516.120(4). Maine and North Dakota have six years. Me. Rev. Stat. Ann. tit. 14,

§752; N.D. Cent. Code §28-01-16. Does Petitioner contend that its ability to defend is impaired as a matter of law in each of these states?

Petitioner has given no examples of cases in which a defendant has successfully challenged a statute of limitation on constitutional grounds because of its length or because it was tolled. However, in *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 122-23 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), the court rejected a defendant's argument that the statute of repose – amended by the legislature while the case was pending so that defendant was denied its benefit, violated its due process rights because the statute served a rational legislative purpose.

Even when statutes of limitation have been arbitrary in their denial of relief to an injured party, courts have found no due process implications. *See, e.g., Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1249-50 (7th Cir. 1989) ("a tolling statute, like any procedural rule, cannot vest plaintiffs with a substantive right in the continued protection of that rule . . . [i]t is the province of the Indiana legislature to allocate the increased cost of health care between the health care providers, insurance carriers and patients and to determine under what circumstances it is appropriate to delay the running of the statute of limitation in spite of the increased risk of lost evidence and lapse of memory. The state need not provide a tolling provision for minority and mental incompetence or a discovery rule in order to comply

with the due process guarantees of a meaningful opportunity to be heard"); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411-12 (8th Cir. 1982) ("[i]f the limitation period is otherwise reasonable, a claimant is not thereby deprived of his right to due process . . . [t]he statute of limitations as applied did not violate Jewson's due process rights").

In other words, procedural rules do not normally vest a party with substantive rights, especially where as in this case, Petitioner cannot show unfair prejudice as a result of the application of that rule. In order to invoke the Fourteenth Amendment's Due Process Clause, Petitioner must show that it's been denied life, liberty, or property without adequate procedural protection. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). It has made no showing that any loss that it has sustained resulted from the point at which it was added to this lawsuit rather than the merits of the claim against it and, therefore, it has not met that burden.

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court determined that state court judgments clearly based on adequate and independent state law grounds are generally immune from Supreme Court review – "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground"). There has been no reason shown to depart from that principle here.

IV.

Misstatements Of Fact Or Law Found In Petitioner's Petition.

On p. 9 of its brief, Petitioner cites *In re Rezulin Prod. Liab. Litig.*, M.D.L. 1348, 2005 WL 26867, *3 (S.D.N.Y. January 5, 2005) for the argument that federal due process requires some limitation on the application of class action tolling. However, due process is not discussed in that case. That court simply stated "[i]n the absence of any suggestion that the New Mexico Supreme Court would adopt the *American Pipe* rule in these circumstances, this Court declines to do so." *In re Rezulin Prod. Liab. Litig.*, 2005 WL 26867, *3 (S.D.N.Y. 2005). Montana has followed the reasoning of *American Pipe* and *In re Rezulin* is therefore inapposite.

Nor does the Lowenthall and Feder law review article cited by Petitioner on pp. 8 and 12 of its petition discuss tolling in terms of due process as is suggested by Petitioner. The article does not mention due process. The article does state, however, that "state courts should recognize that whether the filing of a class action, in state or federal court, should toll a state limitations period is exclusively a matter of state law." Mitchell A. Lowenthall and Norman Menachem Feder, *The Impropriety of Class Action Tolling From Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 568 (1996). In other words, it supports the view that certiorari is inappropriate in this case. Nor does the partisan article represent a unanimous view

regarding the advisability of class action tolling as a matter of public policy.[6]

Nor do any of the cases cited on pp. 21-24 of the petition discuss, as implied by Petitioner, the due process clause in the context of tolling a statute of limitation.[7]

On the other hand, in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 316 (1945), the Court held that retroactive application of a statute of limitation did not violate the Due Process Clause of the Fourteenth Amendment. It held that the appellant securities corporation was not adversely impacted by the retroactive application of the limitation period – "certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Chase Securities Corp.*

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[6] Andrew Burnett, *Recent Development: Philip Morris USA, Inc. v Christensen: A Class Action Claim Can Toll the Statute of Limitations for Individual, Unnamed Members of the Class as Long as the Defendant is Provided with Sufficient Notice*, 37 U. Balt. L.F. 76, 79 (Fall 2006) (noting that the court in *Christensen* "stated there is no reason to have a per se exception for mass-tort cases").

[7] *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855); *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Philip Morris USA, Inc. v. Scott*, ___ U.S. ___, 131 S. Ct. 1, 177 L. Ed. 2d 1040 (2010) do not discuss tolling a statute of limitation.

v. Donaldson, 325 U.S. at 316. Statutes of limitation "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945). *See also*, *Campbell v. Holt*, 115 U.S. 620 (1885) (no due process violation where repeal of a pre-Civil War statute of limitation and its continued postwar suspension prevented it from barring a devisee's action against estate administrators to collect a decedent's debt). The *Chase* Court noted that *Campbell* established "that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase*, 325 U.S. at 314.

On p. 7 of its petition, Petitioner contends that "suspending statutes of limitation indefinitely" for personal injury plaintiffs based on a federal class action introduces systemic unfairness to the defendant. Class actions need not suspend statutes of limitation indefinitely. The defendant has, at all times, the power to bring the class certification issue to resolution.

"[N]othing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question. The only requirement is that the certification question be resolved '[a]t an early practicable time.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-941 (9th Cir. 2009) (holding that a defendant may move to deny class

certification before a plaintiff files a motion to certify – "[t]he plain language of Rule 23(c)(1)(A) alone defeats Plaintiffs' argument that there is some sort of 'per se rule' that precludes defense motions to deny certification, and Plaintiffs have produced no authority to the contrary").

See also, *Jimenez v. Allstate Indem. Co.*, 2010 U.S. Dist. LEXIS 95993 (E.D. Mich. Sept. 15, 2010) ("nothing in Rule 23 prevents a defendant from attempting to preemptively deny certification on the grounds that the prerequisites of Rule 23(a) and (b) can never be satisfied . . . Allstate is permitted to raise certification issues at this stage in the litigation. Allstate's motion is not procedurally improper"); *Fedotov v. Peter T. Roach & Assocs., P.C.*, 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005) ("'The defendant need not wait for the plaintiff to act, however. The defendant may move for an order denying class certification'") (quoting 5-23 Moore's Federal Practice 3d §23.82).

Nor was indefinite suspension permitted in this case. Petitioner, which had had knowledge of all liability issues raised and had been defending against them for nearly a decade, was added to this individual action ten months after it contends the statute of limitation expired. The same result could have occurred for a number of other legal reasons. The court simply held that based on the specific facts of this case, absent any demonstration that Petitioner had been prejudiced by the delay, no "systemic unfairness" had been shown.

On p. 8, Petitioner contends that no pharmaceutical personal injury class "has been certified over opposition and survived appeal in the federal system since *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)." It cites *Jolly v. Eli Lilly & Co.*, *supra*, as an example. First, Petitioner's statement includes so many qualifying facts that it's hard to judge its relevance. Second, neither *Ortiz* nor *Amchem* prohibit class actions for personal injuries. Both cases were limited to the facts of those cases and held that the classes failed for obvious intraclass conflicts. Furthermore, as previously noted, *Jolly* was not decided on the basis that Petitioner repeatedly suggests, as is noted in the Montana Court's opinion (Pet. App., 21a, fn. 3). *Jolly* was based on that court's conclusion that a class action for monitoring did not give the defendants sufficient notice of an individual personal injury claim to warrant tolling. That is not the issue in this case. Petitioner consistently cites *dicta* from *Jolly* as if it was the basis for the court's decision.

On p. 9 and again on pp. 19-20, Petitioner seems to suggest that because plaintiffs in the *Becker* class action did not ultimately move to certify the personal injury aspect of the case, it could not have served as a basis for tolling. However, this court has never required actual certification for tolling because it is the complaint itself which puts the defendant on notice of the issues and the evidence that it need preserve and because as previously noted, the defendant can at any

time terminate the tolling period by simply moving to deny certification.

See Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 2010 U.S. Dist. LEXIS 82196, 6-7 (E.D. Wis. Aug. 11, 2010), (permitting tolling in a subsequent class action during the period that a prior class action complaint was pending even though the plaintiffs' voluntarily dismissed the prior action before seeking certification). The court explained that doing otherwise would defeat the rationale of *American Pipe*.

In accord are *Howard v. Gutierrez*, 474 F. Supp. 2d 41, 45-52 (D.D.C. 2007), and *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1009 (9th Cir. 2008).

On p. 10 of its petition, Petitioner suggests that the Montana Supreme Court felt the result in this case was required by *American Pipe & Constr. Co.*, and that, therefore, this court's intervention is necessary. However, the Montana Supreme Court did just the opposite as is clear from its opinion where it characterized the case as instructive but of little guidance on the parameters of tolling and noted it only applies to federal courts while states are free to adopt their own tolling rules. (Pet. App., 15a). The court simply agreed with this court's reasoning in *American Pipe* and saw no reason not to extend that reasoning to the facts in this case. It was free to do so as a matter of state policy. The fact that it agreed with the reasoning in *American Pipe* did not give rise

to a federal issue or federal jurisdiction over its decision.

On pp. 14-21, Petitioner contends that federal and state court decisions diverge sharply on the appropriate application of *American Pipe* class action tolling and that, therefore, this court must intervene to establish a national standard. However, that invitation to intervention incorrectly assumes there is a federal basis on which the courts diverge. None of the nine cases, previously cited, in which this issue has been directly decided by individual states was based on federal law or involved a due process issue. Furthermore, arbitrarily imposing a federal standard on all jurisdictions just for the sake of uniformity would fly in the face of this court's position that the states act as individual laboratories for the purpose of "crafting appropriate procedures."

In *Smith v. Robbins*, 528 U.S. 259, 275 (2000), Justice Thomas stated the following, in the context of criminal procedure:

> In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us, *see Murray*, *supra*, at 14, while leaving "the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance."

> *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990) (O'CONNOR, J., concurring) (citation and internal quotation marks omitted). We will not cavalierly "impede the States' ability to serve as laboratories for testing solutions to novel legal problems." *Arizona v. Evans*, 514 U.S. 1, 24, 131 L. Ed. 2d 34, 115 S. Ct. 1185 (1995) (GINSBURG, J., dissenting).

See also Justice Kennedy's concurring opinion 514 U.S. at 581, and Justice Scalia's dissent in *Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (citation omitted), joined by Justice Thomas: "[i]n vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the 'special deference owed to . . . state courts.'"

On p. 16, Petitioner contends that other than Montana, only New Jersey has allowed tolling based on a personal injury class action. While that fact would not be relevant to whether there is a federal issue, neither is correct. *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W. 2d (Mo. Ct. App. 1990) and *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002) are all courts which have applied cross-jurisdictional tolling in the mass tort context.

While Petitioner makes numerous public policy arguments for why a state should not adopt cross-jurisdictional tolling in mass tort class action cases, it

cites no decision in which that policy issue was resolved based on a due process or other constitutional basis. The policy arguments made on pp. 14-21 are clearly more properly made to the courts in the jurisdictions cited.

On p. 20 of its petition, Petitioner touts the decision of Judge Todd Campbell refusing to apply cross-jurisdictional tolling to an individual claim that arose in the state of Tennessee. Citing *In re Aredia and Zometa Prods. Liab. Litig. (Foster)*, No. 3:08-0932, 2010 WL 4977066 (M.D. Tenn. Dec. 7, 2010). Judge Campbell's decision adds nothing to the discussion. He simply applied Tennessee law to a case which arose in Tennessee as he was required to do pursuant to the authorities previously cited. The State of Tennessee has rejected cross-jurisdictional tolling as was also previously noted. *See Maestas v. Sofamor Danke Grp., Inc.*, 33 S.W. 3d 805 (Tenn. 2000). The Montana Supreme Court was well aware of the Tennessee decision (Pet. App., 20a) and chose not to follow it. Judge Campbell did not have that option.

Finally, on p. 24 of its petition, Petitioner cites *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir.), *cert. granted*, 131 S.Ct. 795 (2010) as the doomsday scenario to which tort class action tolling could lead. However, to suggest that is even remotely possible is to ignore the plain language of the Montana Supreme Court decision which clearly limited its holding to the facts in this case and held that in the future, the issue would be decided on a case-by-case basis giving significant consideration to the adequacy of the notice

provided by the class action and the length of time to which a party claimed tolling should occur. *Dukes* has no relevance to this case.

CONCLUSION

Because the issue argued was not raised in the lower courts, because the case complained of did not decide a federal issue and is not in conflict with any other state's interpretation of a federal issue, because there has been no demonstration that Petitioner's right to due process has been compromised by the result in this case, and because accepting the petition would justify review of every state tort law issue, the petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF MONTANA
Case No. DA 10-0029

PEGGY STEVENS,
Plaintiff/Appellee.

vs.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant/Appellant,

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE FOURTH JUDICIAL
DISTRICT COURT MISSOULA COUNTY,
THE HONORABLE JOHN LARSON PRESIDING

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Statement of the Issues

1. In January 2008, Peggy Stevens filed suit against her oncologist, Dr. Schmidt, for failing to warn her of the risks of the drug Zometa®. Later – and after the statutory tort limitations period from the date of her injury – she amended her lawsuit to assert an identical claim against NPC. Montana's

fictitious name statute permits amendment of a complaint when the plaintiff "[did] not know the name of the defendant at the time the original complaint was filed." Stevens admits that she knew the identity of NPC long before filing the original complaint. Is Stevens' claim against NPC barred by the statute of limitations?

2. Montana follows the learned intermediary doctrine, which provides that a drug manufacturer's duty to warn extends only to the prescribing physician. Over NPC's objection, and based on a Restatement of Torts (Third) section that has never been adopted by Montana or any other jurisdiction, the trial court instructed the jury that NPC's duty extended to other treating healthcare providers. In closing argument, Stevens' counsel urged the jury to find NPC liable for failing to warn providers other than the prescribing physician. Was the instruction erroneous?

3. Stevens' original complaint against Dr. Schmidt, her amended complaint, her expert disclosures, and her discovery responses, all state facts inconsistent with NPC's liability for failure to warn, such as the fact that Dr. Schmidt was actually aware of the relevant risks of Zometa® at a time when a warning to Stevens would have prevented her injury. Stevens later settled with Dr. Schmidt. The trial court prevented NPC from cross-examining Stevens with this evidence or even from making the jury aware of the fact that Stevens had sued Dr. Schmidt. Was the exclusion of this evidence erroneous?

4. Dr. Schmidt was dismissed from the case on July 8, 2009, following a settlement, and Stevens responded to NPC's discovery request seeking information about the settlement on July 23, refusing to disclose anything. Twelve days later, NPC moved to amend its answer to add an apportionment defense. The trial court refused to permit NPC to amend its complaint on the ground that NPC did not act with "reasonable promptness." Was the trial court's refusal to permit amendment erroneous in light of the standard that leave to amend "shall be freely given when justice so requires"?

5. Stevens had dental surgery due to a broken tooth while she was on Zometa®. Her theory of causation was that the surgery triggered an adverse reaction to Zometa®, and that had she been warned, she would not have had the surgery. The uncontradicted evidence at trial established that Stevens had no choice about having some form of dental surgery to repair the broken tooth. Stevens offered no evidence that she had any surgical alternative that would have been less likely to trigger an adverse reaction to Zometa®. Did Stevens' failure to establish that an adequate warning would have prevented her injury require entry of judgment for NPC?

6. Stevens brought a Montana Medical-Legal Panel proceeding against her oral and maxillofacial surgeon, Dr. Morris, for failing to warn her of the risks of dental surgery while on Zometa®. Dr. Morris stated in his answer that the dental surgery that Stevens had due to her broken tooth was the only

realistic treatment option. When Dr. Morris contradicted this statement at trial by saying that there were other appropriate treatment options, NPC was prevented from impeaching him with his answer before the MMLP. Was the exclusion of Dr. Morris' statement erroneous?

7. Changes to pharmaceutical package inserts postdating the event that allegedly caused a plaintiff's injuries are subsequent remedial measures that are inadmissible under Montana Rule of Evidence 407. Joni Landes, a nurse employee of Dr. Schmidt's oncology practice, was permitted to testify at trial to a change to NPC's package insert for Zometa® that postdated the surgery that Stevens claims caused her injury. Was the admission of the Landes testimony erroneous?

* * *

Argument

I. Stevens' suit against NPC was filed more than three years after her injury and is thus barred by the statute of limitations.

A. Stevens did not sue NPC within the limitations period.

Stevens' claims against NPC should have been dismissed because they are barred by Montana's three-year statute of limitations, MCA § 27-2-204(1). Stevens first named NPC on January 13, 2009; it is entirely undisputed that she sued NPC almost four years after her physician diagnosed her with ONJ

and notified her of an alleged causal connection between Zometa® and ONJ.

In Montana, the statute of limitations on a personal-injury claim begins to run when a plaintiff discovers the cause of her alleged injuries. *See Bennett v. Dow Chem. Co.*, 220 Mont. 117, 121, 713 P.2d 992, 995 (1986) (affirming dismissal of plaintiff's untimely claims and holding that plaintiff cannot "utiliz[e] discovery doctrine to toll the statute of limitations beyond discovery of the cause of an injury"). A doctor's diagnosis and observations on cause satisfy the "discovery" requirement under Montana law. *Id.* (holding that the statute of limitations for plaintiff's claims began to run when plaintiff's doctor diagnosed his injuries and informed him of the suspected cause); *Nelson v. Nelson,* 2002 MT 151, ¶ 26, 310 Mont. 329, 50 P.3d 139 (statute of limitations began to run when plaintiff's physician associated her alleged injuries with exposure to certain chemicals and accidental vaccine injection). The three-year statute of limitations on Stevens' claim thus began to run in March of 2005 when Dr. Schmidt both diagnosed her with ONJ and attributed the cause to Zometa®. (*See* Tr. 754:12-25 (Stevens testifying that Dr. Schmidt told her in late 2004 or early 2005 that she may have ONJ due to Zometa®).) Stevens has conceded that her suit would be barred by the statute of limitations but for her interpretation of the fictitious name statute. (Tr. 1613:11-25 (Stevens' counsel acknowledging that judgment as a matter of law would be proper but for the fictitious name statute

because "Peggy Stevens knew the manufacturer of the drug that she was taking within three years of March 18, 2005" and because "[o]f course she knew that Zometa was manufactured by Novartis and she knew that she had osteonecrosis").)

Because Stevens did not assert any claims against NPC until January of 2009 – ten months after the statute of limitations on her injuries had expired – her claims against NPC are time-barred and should have been dismissed.

B. The clear language of the fictitious name statute precludes Stevens' untimely claims because she knew the identity of NPC prior to filing her original lawsuit.

1. Montana law does not permit the statute of limitations to be tolled while a plaintiff discovers the existence of her cause of action.

Stevens argued before the trial court that her untimely failure to warn claim against NPC was excused by Montana's fictitious name statute. The fictitious name statute establishes a procedure by which a plaintiff who "does not know the name" of a defendant when a complaint is filed may name them later:

> When the plaintiff **does not know the name of the defendant,** the defendant may be designated in any pleading or proceeding

> by any name. **When the defendant's true name is discovered,** the pleadings or proceedings may be amended accordingly.

MCA § 25-5-103.[3] In Montana, "It is well-established that when the language of a statute is clear and unambiguous, the statute speaks for itself. We will not 'insert what has been omitted . . . or omit what has been inserted' nor will we resort to other means of interpretation." *Kulstad v. Maniaci,* 2009 MT 403, ¶ 10, 353 Mont. 467, 221 P.3d 127 (quoting MCA § 1-2-101); *see also JTL Group, Inc. v. New Outlook, LLP,* 2010 MT 1, ¶ 36, 355 Mont. 1, 223 P.3d 912 ("We interpret statutes according to their plain language; if the language of the statute is clear on its face, this Court looks no further.").

Stevens admits that she in fact knew NPC's name when the original complaint was filed. (*See, e.g.*, Pl.'s Resp. Mot. Dismiss and/or Summ. J. on Stat. of Limits. 9 ("[P]rior to filing her [original] complaint, [s]he also knew that the drug which caused her injury had been manufactured by [NPC]").) Her action against NPC is therefore timely only if the fictitious name statute can be interpreted to permit a plaintiff to name a defendant late not only because she is ignorant of the defendant's *name,* but also because

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[3] "Plaintiff's knowledge about the defendant's true name [is determined] at the time of the filing of the original complaint." *Molina v. Panco Const., Inc.,* 2004 MT 198, ¶ 8, 322 Mont. 268, 95 P.3d 687 (holding that "plaintiff's ignorance of defendant's true name must be genuine and not feigned.").

she claims to be ignorant of "the nature of the defendant's culpability." *See id.* at 12. Stevens argued, and the trial court evidently accepted, that discovery of "the name of the defendant" in the statute should be read to include discovery of "the cause of action against the defendant."

Stevens' proposed rewriting of the fictitious name statute, in addition to violating Montana's canons of statutory interpretation, flatly contradicts Montana limitations law, which has long been clear that the statute of limitations is *not* to be extended to the discovery of a cause of action as opposed to the physical cause of an injury. The Supreme Court has in the past been invited to adopt discovery of the cause of action as a trigger for the running of the statute of limitations, and has "expressly decline[d] to extend discovery doctrine to toll statutes of limitation until discovery of legal rights." *Bennett v. Dow Chem. Co.*, 220 Mont. 117, 122, 713 P.2d 992, 995 (1986). In *Bennett*, the Supreme Court was faced with a pesticide applicator's assertion that he should have been allowed to file suit more than three years after his injury because he did not discover his cause of action until later. The Court noted that the appellant "is asking us to apply a 'discovery rule' by which the statute of limitations was tolled until the appellant 'discovered' his legal rights." *Id.* at 120, 713 P.2d at 994. The Court refused to do so, *id.* at 122, 713 P.2d at 995, and noted that "the *farthest reaches of [the] discovery doctrine in Montana*" were represented by a case in which the limitations period was tolled "until

the plaintiff discovered that his [injury] may have been caused by the drug." *Id.* at 121, 713 P.2d at 995 (emphasis added); *see also Sternhagen v. Dow Co.*, 711 F. Supp. 1027, 1030 (D. Mont. 1989) (recognizing that Montana law does *not* permit a plaintiff to toll the statute of limitations until she discovers her legal rights). This is in accordance with Montana statutory law as well. MCA § 27-2-102(2) ("Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.").

Stevens' interpretation of the fictitious name statute amounts to an assertion that a statute of limitations that *could not be tolled* under controlling law under other circumstances *can* be tolled under the guise of the fictitious name statute simply by naming a "John Doe" defendant whose identity is known to the plaintiff when the original lawsuit is filed. This interpretation violates both Montana's rules of statutory interpretation and the clear authority of Montana limitations law.

2. Montana law does not permit the statute of limitations to be tolled by the fictitious name statute when a plaintiff is aware of the identity of the defendant.

Even if it were legally permissible to invoke the fictitious name statute to justify a suit timed to the discovery of the cause of an injury, which it is not, the

tactic would be unavailable here, since no plausible case can be made that Stevens was ignorant of the facts that constituted her claim against NPC. *See Carl v. Chilcote*, 255 Mont. 526, 532 844 P.2d 79, 83 (1992) (statute of limitations begins to run when plaintiff is aware of "the facts constituting the claim . . . notwithstanding the fact that [the plaintiffs] may not have realized they had a possible claim against the City").

In this case, Stevens knew, before filing the original complaint against Dr. Schmidt and long before suing NPC:

- Zometa® was an NPC drug;[4]
- Zometa® allegedly caused ONJ in people undergoing invasive dental procedures;[5]
- There was information about the causal connection that she believed had not been provided to her prior to her tooth extraction;[6]

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[4] (Tr. 797:21-798:6 (Stevens testifying that she performed her own research in 2005 and from that research knew that Zometa® is an NPC drug).)

[5] (*See* Pl.'s Resp. Def.'s Third Disc. Req. 4 (listing articles gathered by Stevens in her literature search, including a September 2003 article by Dr. Robert Marx discussing the alleged association between tooth extractions and ONJ in Zometa patients).)

[6] Stevens admitted that she "knew prior to filing her Complaint that there was information available which explained the relationship [between Zometa® use and ONJ in individuals undergoing tooth extraction] and that it had not been provided

(Continued on following page)

- The contents of NPC's package insert for Zometa® prior to her extraction and injury;[7]
- The contents of a Dear Doctor letter sent out after her injury, warning doctors of the risks of ONJ which Stevens' attorney described at trial as "the first clear signal sent by Novartis to anybody that these extractions should be avoided."[8]

Indeed, it was based on this information that Stevens filed suit in January 2008 against Dr. Schmidt for failing to warn her of the risks of Zometa® – precisely the same claim that she later asserted against NPC. (*Compare* Compl. ¶¶ 16-18 *with* Am. Compl. ¶¶ 14-20.)

Montana law does not permit the fictitious name statute to be used to escape the ordinary operation of the statute of limitations under such circumstances. In *Franchi v. City of Helena*, No. BDV-04-262, 2005 Mont. Dist., LEXIS 529, at *5-6 (Mont. Dist. Ct. Mar. 16, 2005), for example, the court rejected application of the fictitious name statute and granted summary

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to her." (Pl.'s Resp. Mot. Dismiss and/or Summ. J. on Stat. of Limits. 10.)

[7] Stevens' *pre-filing* research revealed not only a Zometa® package insert, but the September 24, 2004 Dear Doctor letter as well. (*See* Pl.'s Resp. Def.'s Third Disc. Req. 4 (listing articles gathered by Stevens in her literature search, including the Dear Doctor letter which also enclosed a copy of the 2004 Zometa® package insert).)

[8] (*See id.* (Dear Doctor letter); Tr. 1675:17-19 (Stevens' attorney's comments).)

judgment based on the statute of limitations because plaintiff "[did] not even suggest that they were ignorant of the name of the Defendant," but rather "claim[ed] that they were ignorant of facts giving rise to the [defendant's] liability." The plaintiff, who was injured riding his bicycle in Helena, originally named several defendants, including several "John Does", but not the City of Helena. After the statute of limitations had run, plaintiff attempted to substitute the City of Helena for a John Doe defendant. The plaintiff knew the name of the defendant, but claimed to be unaware that the other defendants would blame the City for failing to enforce an ordinance. *Id.* The court correctly found that the fictitious name statute was "very clear," and held "[t]his Court will not rewrite the statute." *Id.*

Similarly, in *Dover v. Sadowinski,* 194 Cal. Rptr. 866 (Cal. Ct. App. 1983), plaintiff argued that the defendants negligently caused the death of his wife. After the statute of limitations expired, plaintiff attempted to substitute the defendant physician for a "John Doe" defendant. *Id.* at 867. The court found dismissal proper, noting that the plaintiff's attorneys had admitted that they were aware of defendant's identity but – as Stevens' attorneys did here – argued that they simply did not know how "deeply" the defendant was involved. *Id.* at 869. The court rejected plaintiff's attempt "to create a new standard to be applied in the application of [the fictitious name statute that] . . . the plaintiff must be aware of each

and every detail concerning that person's involvement." *Id.*[9]

Under Montana law, mere knowledge of NPC's identity, without more, would be sufficient to render Montana's fictitious name statute unavailable as an excuse for her late filing. Here, however, Stevens and her attorney knew far more. Based on her own

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[9] *See also Gordon v. Kawamoto,* No. B211948, 2010 WL 1408986, at *9 (Cal. Ct. App. Apr. 9, 2010) (amended complaint naming Doe defendants did not relate back to filing of original complaint because plaintiff should have known the identities of substituted defendants at the time he filed his original complaint; defendants' names were in his medical records and plaintiff knew he had been treated at defendants' hospital); *Lomas v. Dragosz,* No. D054831, 2010 WL 629495, at *5 (Cal. Ct. App. Feb. 24, 2010) (affirming summary judgment because plaintiff knew identity of Doe defendant at time she filed original complaint where plaintiff had previously read traffic accident information card that included Doe defendant's name); *Carey v. Hackensack Univ. Med Ctr.*, 2009 WL 4547211, at *5 (N.J. Super. Ct. App. Div. Dec. 3, 2009) (plaintiff who was aware of defendant's identity could not use fictitious name statute to avoid limitations period, despite plaintiff's contentions that he was unaware of a potential theory of liability against defendant until after limitations period had expired); *Powell v. Coffee Beanery, Ltd.*, 965 F. Supp. 971, 975-76 (E.D. Mich. 1997) (rejecting plaintiff's argument that he was ignorant of "the name" of the defendants within the meaning of California's fictitious name statute since he did not understand that the facts would give rise to a claim); *Miller v. Thomas*, 175 Cal. Rptr. 327 (Cal. Ct. App. 1981) (rejecting fictitious name argument for tolling of limitations where plaintiffs' attorney was aware of the identity of the late-named defendant, and holding that a person who is knowingly omitted from a complaint may not be joined as a fictitiously named party after the statute of limitations has run).

pre-suit research, Stevens believed that she had been inadequately warned, and sued Dr. Schmidt for it. In her research she learned not only that NPC made Zometa®, but also obtained the NPC warnings in effect prior to her injury and a Dear Doctor letter sent out after her injury, which her lawyer called at trial "the first clear signal sent by Novartis to anybody that these [dental] extractions [in patients on Zometa®] should be avoided." (Tr. 1675:17-19.) Stevens provided these to her lawyer. There is no precedent in Montana for any plaintiff with such knowledge claiming – under any legal pretext, including the fictitious name statute – that her ignorance permitted her to file suit without timely naming a defendant known to her. If the decision of the trial court in this case is not overturned, any plaintiff who simply names a John Doe in her initial complaint will be able to argue that she may add defendants for years and years after the expiration of the statute of limitations because she belatedly learned "the nature of the defendant's culpability."[10] The decision must not be allowed to stand, and judgment should be entered in favor of NPC as a matter of law.

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[10] Here, Stevens has argued that she did not know about the extent of NPC's misconduct underlying her cause of action until "mid-July [2009]," *after* suing NPC and gaining access to "literally hundreds of thousands of pages of documents." (*See* PL's Reply Supp. Mot. File Second Am. Compl. 7; *see also* Tr. 827:23-828:2 (Stevens testifying that she did not know "the *extent* of Novartis's knowledge" prior to filing her suit against Novartis).) There is no limit to the exception that Stevens would create within Montana limitations law.

3. Stevens' claimed ignorance of the identity of an NPC sales representative who was later dismissed with prejudice has no bearing on the untimeliness of her action against NPC.

At the same time that she named NPC as a defendant, Stevens also named NPC sales representative Patrick Doyle. Doyle moved for dismissal of this claim, which was independent of the claim against NPC, and the trial court properly granted the motion on the ground that no claim could be asserted against him.[11] Stevens has tried to bootstrap her claim that she was ignorant of the identity of *NPC* by claiming that she was ignorant of the identity of one of NPC's agents, Doyle.

Stevens' knowledge of Doyle is irrelevant. Under Montana law, a plaintiff has a cause of action against all entities in the chain of distribution of an allegedly defective product, including retailers and distributors as well as manufacturers such as NPC. *See Durden v. Hydro Flame Corp.*, 1999 MT 186, ¶ 19, 295 Mont. 318, 983 P.2d 943. As such, regardless of whether Doyle was or was not employed by NPC, NPC's liability as the manufacturer of the product at issue would be independent – exactly as Stevens alleged and litigated in this case.

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[11] (4/7/09 Opinion & Order at 6-8 (dismissing claim against Doyle for fraudulent joinder).)

C. In the alternative, NPC is entitled to a new trial because the trial court refused even to instruct the jury on NPC's limitations defense.

Compounding its legal error, the trial court refused *both sides'* proposed jury instructions and verdict form questions regarding the statute of limitations, Pl.'s Proposed Instr. No. 40-42, NPC's Proposed Instr. No. 1-3, and NPC's Proposed Verdict Form, thus erroneously resolving as a matter of law the question of whether Stevens had timely sued NPC. (Tr. 1611:6-1614:8.) Even if Stevens' novel assertion that the statute had been tolled until she discovered her cause of action against NPC were correct, limitations is a jury question "when there is conflicting evidence as to when the cause of action accrued." *Hill v. Squibb & Sons, E.R.*, 181 Mont. 199, 212, 592 P.2d 1383, 1390-91(1979). The trial court previously held that a "genuine issue of material fact" precluded summary judgment on the statute of limitations. (*See* 10/8/09 Order 6.) Contrary to its holding and despite the record in this case,[12] the trial court then took the issue away from the jury, which

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[12] (*See* Tr. 827:23-828:2 (Stevens testifying that she had no understanding of her claim prior to the time of her lawsuit against NPC); *but see supra* pp. 19-20 (establishing that Stevens was aware at the time of the original complaint against Dr. Schmidt of all facts necessary to state a claim against NPC); Tr. 1313:8-1315:5, 1325:11-1330:11 (NPC's FDA expert Dr. Arrowsmith testifying regarding NPC's ONJ warnings prior to Stevens' dental surgery).)

entitles NPC to a new trial, if judgment is not entered.

* * *

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IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,

v.

PEGGY L. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

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STATUTES

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IN THE

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No. 10-1196

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner,

v.

PEGGY L. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

Respondent dismisses as not "remotely possible" Opp'n. 37-38, petitioner's suggestion, Pet. 24, that havoc would result from application of class action tolling based on pending federal class action disputes such as *Dukes v. Wal-Mart*, 603 F.3d 571, 577-78 (9th Cir.), *cert. granted*, 131 S. Ct. 795 (2010). Respondent assures that the Montana Supreme Court reserved the discretion to find class action tolling inappropriate in a future *Dukes* scenario (*i.e.*, a putative nationwide federal class action filed on behalf of millions of individuals and pending for more than a decade). Accepting respondent's characterization, the Montana Supreme Court's application of a case-specific class action tolling rule is exposed for what it is: a constitutionally-infirm way to leverage Rule 23

to permit a plaintiff to proceed with time-barred individual claims on the theory that a defendant targeted by a federal class action lawsuit cannot possibly suffer prejudice by one more lawsuit, even a time-barred one involving different claims from the putative class action at issue. Montana's case-by-case approach to the availability of class action tolling cannot achieve the theoretical benefit behind the doctrine – the reduction of individual case filings. The sole upshot of the Montana rule is to arbitrarily deny defendants repose from time-barred claims.

A state court cannot insulate its decision from review by opting not to address a constitutional objection unambiguously raised. Here, the Montana Supreme Court's endorsement of class action tolling necessarily rejected all of NPC's challenges to the application of class action tolling, including its due process challenge.

I. NPC Presented Its Constitutional Due Process Challenge To The Application Of Class Action Tolling Below.

While respondent complains that NPC did not properly raise its challenges – including its due process challenge – to the application of class action tolling below, *the Montana Supreme Court considered and rejected Respondent's (nearly verbatim) argument below*. Pet. App. 9a; 8/16/10 Motion. Nor should NPC's arguments below have surprised respondent: she conceded that she did not rely upon the pendency of the never-certified federal class action with regard to the filing of her own claim. Given this record, and given that the putative class action had been pending in Tennessee – a state that has rejected the class action tolling doctrine – NPC argued below that it could not have "reasonably anticipated that

Montana, or any state, would deem its limitations period 'tolled' by the pendency of the Tennessee suit." 7/1/10 Reply at 16.

Respondent observes that she, rather than petitioner, first injected federal law into the case when she "cited [*American Pipe* and *Crown, Cork & Seal*] for the principle that tolling pending a class action is a reasonable compromise between the interest in timely notice served by statutes of limitations . . . " Opp'n. 4. But respondent's observation simply underscores that the applicability of federal precedents regarding class action tolling were actually litigated below.

Finally, the cases cited by respondent are clearly distinguishable from the facts here. For example in *Adams*, this Court rejected petitioner's contention that they properly presented their federal due process claims by simply referring to a couple of federal cases "in the midst of an unrelated argument" in their state court briefs. *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (quoting *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n.9 (1987)). Unlike the petitioners in *Adams*, NPC here expressly and properly raised its due process argument in its state court appellate reply brief.[1]

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[1] The other cases on which respondent relies are similarly inapposite. *See also Board of Directors of Rotary Int'l*, 481 U.S. at 549-50 (federal claim first asserted in petition for rehearing that was denied without opinion was not "properly presented" in state court); *Webb v. Webb*, 451 U.S. 493, 497-99 (1981) (failure to cite basis for full faith and credit claims rendered them not properly presented when sole issue in the case involved interpretation of state statute regarding child custody issues); *Illinois v. Gates*, 462 U.S. 213, 220-21 (1983) (petitioner never

The fact that the Montana Supreme Court failed specifically to address NPC's federal due process arguments is not dispositive. Respondent admits – as she must – that this Court's jurisdiction to consider a federal claim extends to federal questions that were "either addressed by *or properly presented to* the state court that rendered the decision it has been asked to review." Opp'n. 19 (emphasis added) (citing *Adams*, 520 U.S. at 86. *See also New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 66 (1928) (holding that federal question was properly presented if the "necessary effect of the judgment has been to deny the [federal] claim"). "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969) (holding that federal question, though not discussed in lower court rulings, was properly before this Court because petitioner's state court motions included specific arguments that his federal rights had been violated).

This Court accepts jurisdiction over cases involving less conspicuous presentations of federal questions than the unambiguous language included in NPC's argument to the Montana Supreme Court. For example, just days ago this Court granted *certiorari* and vacated a state court's judgment on federal preemption grounds in a case where the petitioner had not specifically asserted its preemption claim until *after* the state courts had already rejected its appeals under state law. *Sonic Auto., v. Watts*, No. 10-315 2011 WL 1631040 (U.S. May 2, 2011);

"raised or addressed the question whether the federal exclusionary rule should be modified in any respect" in state courts).

Respondent's Brief in Opposition to Petition for Writ of Certiorari, *Sonic Auto., v. Watts*, No. 10-315 2010 WL 3905541, at *8 -*14 (U.S. Oct. 1, 2010) (preemption not asserted until petition for rehearing stage); Pet'r's Reply Br., *Sonic Auto., 2752 Laurens Rd., Greenville, Inc. v. Watts*, No. 10-315 2010 WL 4022702, at *3 -*5 (U.S. Oct. 13, 2010) (only referred to "federal policy" in favor of class action arbitration, rather than specifically arguing preemption, prior to petition for rehearing).[2] The South Carolina Supreme Court's denial of the *Sonic Automotive* petitioner's petition for a rehearing "wholly based on state law grounds" and without mention of the federal preemption argument did not deter this Court from concluding that the federal preemption issue was necessarily decided by the South Carolina Supreme Court, and thus subject to this Court's review.

Because NPC specifically raised its due process challenge in the state court below, this Court has jurisdiction to determine whether the application of class action tolling violates NPC's constitutional rights.

II. Application Of Class Action Tolling In Circumstances Like Those Here Is Fundamentally Unfair And Thus Violates Core Due Process Principles Long Recognized In This Court's Jurisprudence.

A primary inquiry in nearly every case that has analyzed *American Pipe* and the class action tolling

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[2] *See also Hathorn v. Lovorn*, 457 U.S. 255, 259-63 (1982) (first assertion of federal right at petition for rehearing stage was properly presented giving rise to review by this Court).

doctrine has analyzed whether its application would be unfair to the defendant, an inquiry which implicates the fundamental fairness analysis lying at the very heart of the Due Process Clause. Indeed, this Court has long recognized that fairness to litigants is the essence of any analysis of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Morgan v. United States*, 304 U.S. 1, 19-20 (1938) ("fundamental requirements of fairness . . . are of the essence of due process in a proceeding of a judicial nature"); *Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008) ("ratification of the Fourteenth Amendment radically changed the federal courts' relationship with state courts . . . [because it] imposes minimum standards of fairness on the States" (internal quotation omitted)); *Rivera v. Illinois*, 129 S. Ct. 1446, 1454 (2009) ("The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal [or civil] trial.'"); *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) ("due process concern homes in on the essential fairness of the state-ordered proceedings").

Respondent's contention that no class action tolling cases have been "resolved based on a due process or other constitutional basis," Opp. at 36-37, completely ignores the boundaries this Court has imposed on the class action doctrine from the outset. The two cases on which respondent, and the courts below, rely most heavily are prime examples of the inherent importance of fundamental fairness – and thus due process protection – in any class action tolling analysis. From this Court's first enunciation of the doctrine in *American Pipe*, this Court emphasized that class action tolling would be appropriate only where the core "polic[y] of ensuring essential fairness to

defendants" had been adequately satisfied. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). This Court later expounded on the critical importance of fairness in class action tolling analyses when Justice Powell declared that "[c]laims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 355 (1983) (J. Powell, concurring).[3]

This Court's focus on fairness in analyzing the applicability of the class action tolling rule is not surprising considering its repeated acknowledgement that the underlying purpose of statutes of limitations is to ensure fairness to defendants. *See Rothensies v.*

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[3] Many state courts have followed this Court's lead in demanding fair notice to defendant before applying class action tolling. *See Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 934-35 (Cal. 1988) (refusing to extend class action tolling rule to save untimely personal injury claims while noting that the one of two "major policy considerations" underlying the *American Pipe* tolling rule is "the effectuation of the purposes of the statute of limitations" which includes " 'ensuring essential fairness to defendants' ") (quoting *American Pipe*, 414 U.S. at 554-55); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App. 1995) (refusing to toll statute of limitations in mass personal injury claim because the "basic premise of the *American Pipe* ruling is that a statute of limitations can be tolled while class allegations are pending, provided the defendant has notice of the type and potential number of the claims against it"); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. App. Div. 1999) (tolling applicable for mass personal injury claims only if plaintiff's "identity was disclosed or readily ascertainable upon the filing of the class action or upon its amendment within the period of limitations or who shows that he has deferred filing an individual suit in reliance on the pendency of the class action").

Elec. Storage Battery Co., 329 U.S. 296, 301 (1946) ("a statue of limitation is an almost indispensable element of fairness"); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants.").

Indeed, the Court has applied fairness principles to reject tolling in circumstances where the defendant had much more notice of the specific claims against it than did NPC in this case. For example, in the employment discrimination case *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 466-67 (1975), the Court rejected an employee's argument that his filing and active pursuit of an administrative complaint for employment discrimination with the Equal Employment Opportunity Commission effectively tolled the statute of limitations for filing a claim for damages under 42 U.S.C. § 1981 involving the same underlying facts. Even though the employer in *Johnson* was indisputably aware of the specific claims asserted by the specific employee years before the statute of limitations would have run on the § 1981 federal claim, this Court found tolling unfair to the defendant because the claims in the second action were not identical to the claims in the first. 421 U.S. at 466-67. Just one year after *American Pipe*, the Court rejected petitioner Johnson's bid for *American Pipe* class action tolling because tolling applies "[o]nly where there is complete identity of the causes of action"). *Id.* at 467 n.14.

The Montana Supreme Court's rationale that a defendant "is only entitled to be noticed of the nature of claim," Pet. 19, n.4, and that a pharmaceutical manufacturer has been provided fair notice of the "nature" of subsequent individual claims under

American Pipe so long it is involved in *any* personal injury litigation concerning a specific drug, flies in the face of this Court's holding in *Johnson*.

As articulated at pages 12-13 of the Petition, a mass tort personal injury putative class action complaint fails to provide *any* notice, let alone fair notice, of the specific claims and identities of unnamed plaintiffs, their treating physicians, medical history, and other evidence critical to the claims and defenses in such cases (*e.g.*, specific causation, proximate cause, notice of warnings, etc.). Therefore, imposing the *American Pipe* tolling rule in such circumstances, such as in this case, results in the type of fundamental unfairness and implicit breach of due process that *American Pipe* and its progeny have cautioned against.

III. The Court Should Address The Fundamental Unfairness Of Applying Class Action Tolling To A Pharmaceutical Mass Tort Personal Injury Case.

Respondent misapprehends the relevance of the California Supreme Court's refusal to apply the class action tolling rule in a case, like this case, involving the tolling effect of a never-certified personal injury class action. *See Jolly*, 751 P.2d at 933-38. In *Jolly*, the California Supreme Court clearly stated the issue before it: "The question to be asked, then, is whether [claims supposedly tolled under a pending] mass-tort class action fits the rationale of [*American Pipe*]. We believe the answer is no." *Id.* at 934 (citations omitted). In so holding, the court engaged in a thorough discussion of why class action tolling is particularly inappropriate in mass tort claims, whether based on the similar causes of action for either medical monitoring or personal injury. *Id.* at 933-38. The

court held, among other things, that "courts should utilize the procedures of rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) to ensure fairness in the resolution of class action suits," *id.* at 933, that mass torts are generally " 'not appropriate for class litigation . . . based upon the overwhelming uniqueness of the issues stemming from the necessity for the trier of fact to hear and determine individually each victim's injuries,' " *id.* at 934, and that "major elements in tort actions for personal injury – liability, causation, and damages – may vary widely from claim to claim . . ." *Id.* at 936. The court further observed that personal injury mass tort claims, like respondent's claims here, are so unique and fact-specific that "such claims may be presumptively incapable of apprising defendants of 'the substantive claims being brought against them,' a prerequisite, in our view, to the application of *American Pipe*." *Id.* at 937 (citing *American Pipe*, 414 U.S. at 55 and *Crown, Cork & Seal*, 462 U.S. at 353). The court concluded that "[t]he same reasons that render certification of mass-tort claims generally inappropriate render inappropriate the application and extension of [*American Pipe*] to the present case." *Id.* at 936. Respondent's complaint that the well-conceived rationale underlying this holding represents *dicta* makes no sense and contradicts the plain language of the court's holding.

Respondent also contests, Opp'n. 33, petitioner's observation that no pharmaceutical personal injury class "has been certified over opposition and survived in the federal system since [*Ortiz*] and [*Amchem*]. *See* Pet. 8. Not surprisingly, however, respondent cites no example of any such case in support of her claim. None exists.

Finally, *Chase Securities. Corp. v. Donaldson*, 325 U.S. 304 (1945), cited by respondents, Opp'n. 30, actually recognizes that while statutes of limitations are creatures of state law, their application can offend federal constitutional protections. *Chase* involved the retroactive application of a newly created statute of limitations specifically for securities actions; as petitioner has explained, tolling based on a securities class action does not implicate the same issues of fair notice as mass tort class actions. (*See* Pet. 15-16.) Indeed, the Court recognized in *Chase* that "statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution" in certain circumstances. 325 U.S. at 315-16. This is such a case.

CONCLUSION

For the foregoing reasons, and the reasons outlined in the Petition, the Court should grant the Petition for Writ of *Certiorari*.

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